TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 141

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PETITIONER,

vs.

JOHN BELLSTAB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 11, 1928

CERTIORARI GRANTED DECEMBER 12, 1928

(32,304)

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,	Action at Law.
vs.	
JOHN REILSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, Respondents.	Petition.

TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT:

Your petitioner, The Delaware, Lackawanna and Western Railroad Company, respectfully shows to this Honorable Court:

I. That your petitioner is a corporation, organized and existing by virtue of the laws of the State of Pennsylvania, and is a citizen of that state.

II. That on the ninth day of December, 1920, David Ginsberg, individually and as next of friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey, in the Morris Circuit thereof, for personal injuries to the

said David Ginsberg and Harry Ginsberg, and on account of the death of George Ginsberg, for the alleged negligent acts of the agents and servants of your petitioner, in running into and upon said named parties a locomotive operated by your petitioner.

III. Your petitioner further shows that on December 28th, 1920, said cause was removed to the United States District Court for the District of New Jersey, on account of diversity of citizenship, wherein issue in said cause was subsequently joined in said action and the case duly noticed for trial.

IV. Your petitioner further shows that on December 2nd, 1921, at the September, 1921, Term of the District Court, said cause was tried and resulted in a verdict for the plaintiffs in said action, which verdict was subsequently set aside by said Court and a new trial granted your petitioner.

V. Your petitioner further shows that thereafter at the January, 1923, Term of Court, said cause was again brought on for trial and on March 3rd, 1923, the jury in said cause rendered a verdict for the defendant and that after the denial by said Court of an application by the plaintiffs for a new trial, rule for judgment final for the defendant, with costs, was entered in the said District Court on June 21st, 1923.

VI. Your petitioner further shows that thereafter, on August 2nd, 1923, plaintiffs in said action filed their assignments of error and petition for writ of error to your Honorable Court, which writ of error was allowed and said cause removed to your Honorable Court for review, and that on March 21st, 1924, the mandate of your Honorable Court, affirming the judgment of the District Court, in favor of your petitioner, was filed with and in the said District Court.

VII. Your petitioner further shows that at no time during the term at which judgment final for your petitioner was rendered in the District Court did the District Court extend said term, nor did the attorneys for the respective parties to said action stipulate or file any stipulation in the District Court, extending the term in which said judgment final was rendered, and that the said April, 1923, Term of said District Court expired on the day previous to the opening of the September, 1923, Term of said Court, which according to the statute in such cases made and provided and the rules of said District Court, commenced on the second Tuesday in September, 1923.

VIII. Your petitioner further shows that even after the mandate of your Honorable Court affirming the judgment obtained by your petitioner in the District Court came down and was filed in the District Court on March 21st, 1924, which was during the January, 1924, Term of said District Court, and which term, according to the statutes in such cases made and provided and the rules promulgated by the said District Court, expired on the day preceding the first Tuesday in April, 1924, the said plaintiffs neither extended said January, 1924, Term of said District Court, either by stipulation with your petitioner, or by any order of said Court, and that said January, 1924, Term of said District Court expired without it in any way or manner being extended, all of which facts appear from the docket entries of said District Court, a copy of which is annexed to this petition and made to form a part thereof, and is marked "Exhibit A", and the certificate of the Clerk of said District Court hereto attached are made to form a part thereof and marked "Exhibit B".

IX. Your petitioner further shows that on the first trial of said cause in the District Court, the main reason

10 why said District Court set aside the verdict rendered in favor of the plaintiffs and against your petitioner, was for and on account of certain perjured testimony given on the trial of said cause on behalf of the plaintiffs in said cause by two witnesses, one Addie Ridner and the other William Ridner.

X. Your petitioner further shows that on the second trial of said cause, which resulted in a verdict for your petitioner, your petitioner produced the said Ridners as witnesses on its behalf and, although the said plaintiffs and their attorney were well aware of the fact that said Ridners had given testimony on the first trial of said
11 cause when they appeared for the plaintiffs, which was contradictory to the testimony said witnesses gave on behalf of your petitioner on the second trial of said cause, neither said plaintiffs nor their attorney in any way or manner sought to impeach the veracity or credibility of said Ridners on the second trial of said cause.

XI. Your petitioner further shows that on March 30th, 1925, the plaintiffs in said action in the District Court filed two affidavits with the Clerk of said Court, of which true copies are hereto attached and made to form a part of this petition, being marked "Exhibits C and D", and that the William Ridner who made one of said affi-
12 davits is the William Ridner hereinbefore referred to, who was a witness for the plaintiffs on the first trial of said cause, and a witness for your petitioner on the second trial of said cause.

XII. Your petitioner further shows that on the filing of said affidavits and a notice of application to your petitioner to be made to the Honorable John Rellstab, Judge of the District Court for the District of New Jersey, said Honorable John Rellstab did on April

28, 1925, allow said plaintiffs a rule to show cause why 13
the judgment in favor of your petitioner which as hereto
fore set forth is shown to have been entered on June 21st,
1923, should not be set aside and a new trial granted, a
copy of which rule to show cause forms a part of this
petition and is marked "Exhibit E", and that your pe-
titioner at said time, to-wit, on March 30th, 1925, filed
answering affidavits, a copy of which are hereto attached
and made to form a part of this petition and are marked
"Exhibits F, G, H".

XIII. Your petitioner further shows that, pursuant to said rule to show cause allowed said plaintiffs, notice of the taking of testimony thereunder was given your pe- 14
titioner and that on May 5th, 1925, testimony was taken on said rule to show cause before the Honorable John Rellstab, and said rule to show cause was made absolute by the said Honorable John Rellstab, as is shown by his order of May 9, 1925, a copy of which is hereto attached and made to form a part of this petition and is marked "Exhibit I", although on the hearing of said testimony, the said Honorable John Rellstab recognized that the said District Court may have lost jurisdiction over the verdict rendered in favor of your petitioner and the judg ment final entered thereon on June 21, 1923.

XIV. Your petitioner further shows that it is advised 15
that the said Honorable John Rellstab, Judge of the said District Court, and said District Court, had no right or authority to disturb or set aside the verdict and judg ment entered thereon in favor of the defendant on June 21st, 1923, because the said District Court had lost juris diction of said cause, the term of said District Court in which said judgment final was rendered in favor of your petitioner having long since expired and having not been

16 extended either by stipulation between the parties thereto or any order of the Court in the premises.

XV. Your petitioner further shows that as a result of the Hon. John Rellstab granting the said plaintiffs a new trial in said matter, your petitioner will be obliged to expend large sums of money in the preparation of said cause for retrial, as said cause was a very expensive case to try, and will lose the costs of ten hundred ninety-two 35/100 Dollars ($1092.35) already awarded to it as a result of the said judgment it has already obtained against the plaintiffs in said action.

17 XVI. Your petitioner further shows that, unless this Honorable Court grants to it a stay in the premises until your Honorable Court has determined whether your petitioner is entitled to the relief prayed for in this petition, it is not only possible, but highly probable that said cause will be listed for trial and tried at the September, 1925, Term of the District Court before this Honorable Court can make a determination in the premises as to whether your petitioner is entitled to the relief prayed for.

WHEREFORE, your petitioner, The Delaware, Lackawanna and Western Railroad Company, with the aid of
18 this Honorable Court thus requesting, prays that a writ of mandamus may issue out of this Honorable Court, directing and commanding the said Honorable John Rellstab, Judge of the said District Court, and said District Court, to reinstate the judgment entered in said District Court in favor of your petitioner, or in the alternative, that a writ of certiorari be allowed your petitioner that therein may be done and corrected what otherwise contrary to the law of the land, and that a

stay of all proceedings in said cause in said District Court be granted your petitioner, until this Honorable Court has inquired into and decided the merits of your petitioner's petition.

And your petitioner will ever pray.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
By FREDERIC B. SCOTT,
Its Attorney.

STATE OF NEW YORK, }
County of New York, } ss:

FREDERIC B. SCOTT, of full age, being duly sworn, on his oath, says, that he is the attorney of The Delaware, Lackawanna and Western Railroad Company, the petitioners in the foregoing petition; that he has had personal charge of the action of David Ginsberg, *et al*, etc., against The Delaware, Lackawanna and Western Railroad Company, more particularly described and referred to in the second paragraph of the foregoing petition.

This deponent further says that he has read said petition and that the matters and things therein set forth are true.

FREDERIC B. SCOTT

Subscribed and sworn to before me this 17th day of June, 1925.

JOSEPH FIELL.
[L. S.] Notary Public No. 49
New York County
Commission expires on March 30, 1927.

22

Exhibit A.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, Administrator *ad prosequendum* of the Estate of GEORGE GINSBERG, deceased,	# 2825
VS.	At Law
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY	Removed from N. J. Supreme Court

23

DOCKET ENTRIES

Dec	28,	1920	Copy of Proceedings filed
Jan	6	1921	Answer filed
"	7,	"	Reply filed
"	13,	"	Notice of Trial filed
Mar	19,	"	" " " "
24 Apr	4,	"	Continued for Jan Term
May	3,	"	5 subpoenas, 5 copies
Sept	12	"	Continued for April Term
Nov	1,	"	" " Sept "
"	30,	"	Trial
Dec	1,	"	"
"	2,	"	Trial Verdict for Plaintiffs, David Ginsberg $6,000, Harry Ginsberg $750 David Ginsberg, Admr $15,000

Dec.	5,	1921.	Rule to Show Cause why verdict should not be set aside and new trial granted, filed.	25
"	27,	"	Hearing on Rule to Show Cause why verdict should not be set aside and new trial granted. Decision reserved.	
"	29,	"	Memorandum filed.	
"	"	"	" "	
Jan.	4,	1922.	Order on Rule to Show Cause, &c., filed.	
"	"	"	Order denying application for new trial, filed.	
"	"	"	Remittitur filed.	
"	"	"	Rule for Judgment Final for plaintiff, for David Ginsberg, for $6,000, David Ginsberg, as Admr. $8,000, Harry Ginsberg for $750 and plaintiff's costs, filed.	26
Jan.	4,	"	Judgment Recorded.	
"	16,	"	Order extending time to file Bill of Exceptions filed.	
"	30,	"	Order extending time to file Petition, &c. for Writ of Error, filed.	
Feb.	3,	"	Petition of Defendant filed.	
"	"	"	Rule to Show Cause why verdict should not be set aside and new trial granted, filed.	
"	6,	"	Hearing on Rule to Show Cause why verdict should not be set aside. Ordered referred to John M. Emery as Special Master.	27
"	"	"	Order of Reference filed.	
"	21,	"	Order extending time to file Bill of Exceptions, filed.	
"	"	"	1 Subpoena.	
Mar.	8,	"	Order extending time to file Bill of Exceptions filed.	
"	30,	"	Order extending time to file Bill of Exceptions filed.	

34 May 5, 1925. Notice of Motion to take Testimony filed.
" " " Testimony taken on Rule to Show Cause. Ordered rule to Show Cause be made absolute.
" 11, " Order setting aside verdict and granting new trial.

UNITED STATES OF AMERICA,
District of New Jersey. } ss:

I, GEORGE T. CRAMNER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the fore-
35 going to be a true copy of the original DOCKET ENTRIES on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said District, this 18th day of June nineteen hundrdsl and twenty five.

GEORGE T. CRAMNER
Clerk, District Court, U. S.
by R. S. CHEVRIER
Deputy.

[L. S.]

36

Exhibit B.

37

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, Administrator *ad prosequendum* of GEORGE GINSBERG, Deceased,

Plaintiffs,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant.

Certificate of District Court Clerk.

38

I, GEORGE T. CRAMNER, Clerk of the United States District Court for the District of New Jersey, certify that a search of the records of the United States District Court for the District of New Jersey shows that neither the January, April or September, 1923, Terms of said Court, nor the January and April, 1924, Terms of the above Court, with respect to the above entitled action, were ever extended, either by any order of the above Court or by any stipulation between the above parties, or their attorneys, and filed in my office.

39

That the Terms of said Court referred to herein expired or ended at the times provided by law and the rules of said Court promulgated in accordance therewith.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Trenton in said District, this 18th day of June, 1925.

GEORGE T. CRAMNER
Clerk, District Court of the United States.
By R. S. CHEVRIER
Deputy.

[L. S.]

40 **Exhibit C.**

STATE OF NEW JERSEY }
County of Morris } ss:

SETH RIDNER, of full age, being duly sworn on his oath deposes and says that he is the son of William N. Ridner and Adeline Ridner; that in June 1920 he resided with his parents at Mill Pond; that about 1:30 o'clock in the afternoon of June 29, 1920 deponent and his father, William N. Ridner, left their home to pick cherries along the tow-path of the Canal in the direction of Kenvil from Mill Pond; deponent and his father, while walking along the tow path, had some words and deponent and his father
41 returned home without picking any cherries; then deponent took his father's pails and got the Smith boys, Ted and Charles, to accompany him while picking cherries; that deponent and the Smith boys started picking cherries in a tree along the tow-path at a point not far distant (about 1000 feet in distance) from where the Lackawanna Railroad tracks crosses the roadway leading from Wharton to Kenvil; that deponent while in the cherry tree saw the Ginsberg car enter a farm driveway almost directly opposite from the cherry tree on the other side of the Canal; Mr. Ginsberg was driving the car and one of his sons occupied the front seat with him; that one other son was in the back of the car which contained
42 either a cow or calf; that the farm driveway in question is on the first farm on the right hand side of the roadway before reaching the railroad crossing on the road leading to Kenvil; about one half an hour later deponent saw the Ginsberg car back out of the driveway and at that time Mr. Ginsberg and one son occupied the front seat while the other son remained in the back of the car with either a cow or calf; that the Ginsberg car started up the road

way in the direction of Kenvil; that the next thing 43
deponent heard was a scream, shrill whistle and a crash
all at once; that the cherry tree in question was about
fifty feet high and deponent was picking cherries near
the top of the tree and had an unobstructed view up to
the crossing; that when deponent heard the scream,
whistle and crash he saw the rear end of the Ginsberg
truck struck and turned so that the progress of the train
which had continued so that the last half of the car was
left standing on the crossing, prevented deponent seeing
what had happened to the Ginsberg car; that deponent
waited until the train proceeded on towards Kenvil and
then came down out of the tree and proceeded to the
crossing and found that the cow or calf was in the canal 44
and later hobbled up on the bank; that the Ginsberg car
was hanging over a concrete wall near the crossing the
front of the car holding it up and preventing a 20 to 30
feet drop; deponent and the Smith boys stayed there
about 15 minutes and then retraced their steps along the
towpath to the railroad Y at Wharton; that the Smith
boys proceeded home to Mill Pond and deponent went on
to Wharton to the home of his grandmother Emma
Ridner who resides Irondale road, in Wharton; that
deponent returned to his home at Mill Pond between 6:30
and 7:00 P. M. that evening; that deponent did not see
his father William N. Ridner or his mother Adeline or
Addie Ridner at the scene of the accident; that his 45
parents could not have been there because it would be
necessary for them to pass deponent on the way and that
if they were there he would have seen them but they were
no wheres in sight before or after the accident; that on
one occasion, after the accident, deponent heard his
father and mother say that they were going to be wit-
nesses for Ginsberg; that when deponent returned home
on the night of the accident June 29, 1920; Mrs. John
Smith, a next door neighbor and mother of Ted and

46 Charles Smith who were with deponent picking cherries, was in deponent's home telling deponent's mother and father about the accident; that once when Mr. Ginsberg visited deponent's home a long time after the accident and before the first trial in the Federal Court at Newark, when deponent's father and mother testified for Mr. Ginsberg, deponent told Mr. Ginsberg that he was nearby when the accident happened and had heard the scream, whistle and crash and deponent was asked by Mr. Ginsberg to come to Newark and tell what deponent knew about the accident but deponent refused to go as a witness. Mr. Ginsberg never asked deponent after that to be a witness.

47 While deponent's parents and Mrs. John Smith were discussing the accident on the night of June 29, 1920, deponent said to them "The truck is in pretty bad shape", but did not tell them that he was there at the accident and they did not ask deponent about it. Sometime after the accident, deponent did tell his parents about the accident. That deponent was present on two occasions when Mr. Ginsberg called at his home and deponent never heard Mr. Ginsberg ever ask either of deponent's parents to be witnesses for him.

I make this statement voluntarily and without any fear or threat or hope or promise or rewards of any kind whatsoever.

48 I have read this statement of five pages and it is *true*.

SETH RIDNER

Subscribed and sworn to before me this 13th day of January, 1925 } SETH RIDNER

WILLIAM A. HEGARTY,
Master in Chancery of New Jersey.

Exhibit D.

STATE OF NEW JERSEY }
County of Morris } ss:

WILLIAM N. RIDNER, of full age being duly sworn on his oath deposes and says that he resides at Kenvil, in said County of Morris; that he is married and his wife's name is Adeline; that his wife's name is also known as Addie and that eight living children resulted from said marriage; that in June, 1920 he was living with his wife and family at a place called Mill Pond in said County of Morris; that Mill Pond is located midway between Wharton and a spot where the road crosses the Lackawanna Railroad tracks and where an accident occurred on June 29, 1920; that on June 29th, 1920, he was walking with his son Seth Ridner, at about five o'clock in the afternoon and had passed over the crossing in question on his way home; that about 8 P. M. of the same date June 29th, 1920, he was informed by someone whose name he cannot recollect that an accident had happened at the R. R. crossing and that David Ginsberg of Wharton and his boys were in the accident and that they were struck by a Lackawanna train while driving their truck over the railroad crossing; that on June 30th, 1920 he visited the scene of the accident accompanied by one of his sons, either Fred or Seth; that he saw the wrecked truck on the Kenvil side of the railroad crossing; that he was at his home with his wife when news of the accident was received on June 29th, 1920 about 8 P. M., in the evening and up to that time he did not know about the accident and neither did his wife; that he was home all the time from a little after five P. M., until word of the accident had been received; that he and his wife learned about it the same time and that

52 his wife could not have learned about the accident prior to the time it was received because no communication of any kind was had with anyone outside of his immediate family until the time the neighbor gave the news at or about 8 P. M.

Some days after the accident deponent and his wife visited the grocery and butcher store in Wharton and told Mrs. Ginsberg that he was sorry for them; that some groceries were purchased and that he and his wife returned home; that up to that time he had never traded with the Ginsbergs in reference to groceries; that at various times thereafter small purchases of groceries were made by his family a the Ginsberg store; that
53 some few days after his first visit to the Ginsbergs for groceries he again went to the Ginsberg store to make a purchase and Mr. David Ginsberg learned he was in the store and Mrs. Ginsberg brought him in to see Mr. Ginsberg; that he talked about the accident with Mr. Ginsberg and expressed his sympathy for him; that at a later date deponent and his wife visited Mr. Ginsberg and volunteered to be witnesses for Ginsberg; that at the time deponent and his wife volunteered to be witnesses nothing was said to Ginsberg about money and Ginsberg never said a word about money to either deponent and his wife; that at various times thereafter deponent talked with Ginsberg either at Ginsberg's home or at deponent's home; that all during these talks Gins-
54 berg was ignorant of the fact that deponent and his wife had never seen the accident.

After Mr. Ginsberg was able to get about and was still recuperating, deponent went with Mr. Ginsberg, Mrs. Ginsberg, and a son or daughter of the Ginsbergs to the office of Senator Gebhardt at Clinton, N. J., that the trip was made by auto and Mr. Ginsberg drove the car; that the Senator was not there and inquiry as to

his whereabouts was made of the girl in the office; that 55
the party left right away; that a statement prepared
in the office of Senator Gebhardt was presented to him
for signature after the visit to Clinton; that he does
not recollect if the statement was received in the mail
or handed to him by Mr. Ginsberg, but deponent remem-
bers signing same in the house of Mr. Ginsberg.

Deponent and his wife in discussing the accident with
Mr. Ginsberg said that he heard "No whistle—no bell—
no warning of any kind prior to the crash. That it was
a misty day and the train was going 50 to 60 miles an
hour.

Shortly after the statement was signed by deponent
he accompanied Mr. Ginsberg, Mrs. Ginsberg a daughter 56
of the Ginsbergs and some man whose name deponent
does not know, to the office of Senator Gebhardt and then
to the home of Senator Gebhardt at Clinton, N. J. At
Ginsberg's request, deponent and the stranger entered
the home of Senator Gebhardt and requested of the Sena-
tor the papers in Ginsberg case; that Senator Gebhardt
said "he did not want to see him" meaning Ginsberg.
Ginsberg told deponent, a few days thereafter that he had
received the papers from Senator Gebhardt. Ginsberg
told deponent that his reason for wanting the papers
back from Senator Gebhardt was because of the fact
that Mrs. Ginsberg was always insisting that Senator
Gebhardt was no good.

After Ginsberg received the papers from Senator Geb- 57
hardt, deponent accompanied Mr. Ginsberg, Mrs. Gins-
berg and a daughter of the Ginsbergs, in an automobile
to Paterson, N. J., to visit a lawyer whom Ginsberg had
a talk with.

Just on the day of the first trial before the Federal
Court in Newark, deponent and his wife accompanied
Mr. & Mrs. Ginsberg to the office of Mr. Isadore Kalish
where a conference was held about the facts in the case.

58 Mr. Isadore Kalisch asked deponent and his wife to give their version of the case and the stories told Mr. Kalisch, at that time, were identical with that of the testimony of deponent and wife at the trial; that the stories were given voluntarily.

Some two or three months after the trial when deponent had not received anything from Ginsberg to compensate him for loss of time while going around with Ginsberg, deponent's wife showed that she was peeved and disgusted and had, without deponent's knowledge, addressed a letter to Mr. Kalisch stating that neither my husband or I have received any compensation for our time in the Ginsberg case as promised and that unless
59 something was paid at once she would make trouble for Mr. Ginsberg or words to that effect. Deponent knew that she was angry about the matter but did not know that she had written the letter until he heard it read before Commissioner Emery in Newark.

Prior to the hearing before Commissioner Emery in Newark, Seth Ely, Dover lawyer, visited the home of deponent in reference to a bill for goods from Spear & Co., Chicago, Ill., Seth Ely after discussing the bill from Spear & Co., asked deponent and his wife "if they had changed their minds about the Ginsberg case" and before deponent could answer, his wife said "that's up to me". Mr. Ely then said "if you change your minds let
60 me know".

Mrs. Ridner later visited the office of Mr. Ely at Dover and made a statement in reference to the Ginsberg case. Deponent was told of the statement by Mr. Ely while deponent was working for Mr. Ely on his farm near Rockaway. Mr. Ely told deponent that Mrs. Ridner had changed her testimony and was ready to so testify and wanted to know if deponent would do likewise and deponent said he would. Deponent was employed by Mr. Ely two weeks and had never worked for him before or

since. Mr. Ely after telling deponent about the state- 61
ment made by deponent's wife, took deponent from the Ely farm to Mr. Ely's office at Dover. The statement of deponent's wife was then read to him, a similar one was prepared and deponent signed same in Mr. Ely's office and the effect of the contents of said statement was that deponent did hear a warning—did hear a bell, did hear a whistle.

That as far as deponent's knowledge is concerned the bill of Spear & Co., was never paid for by him and he cannot say if his wife ever paid it. At any rate, deponent never heard any more about the Spear & Co., bill and the goods were never taken away.

Deponent further states at no time did Mr. Ginsberg 62
ever offer anything to deponent or his wife and that so far as Mr. Ginsberg is concerned and at no time during my talks with Mr. Ginsberg did Mr. Ginsberg ever suggest that deponent and his wife should testify to anything but the truth and up to the present day Mr. Ginsberg is still ignorant of the fact that deponent and his wife never saw the accident.

Deponent further states that this statement is made voluntarily without any promise or threat or hope of reward of any kind whatsoever.

I have read this statement of Eight Pages and it is true, William N. Ridner.

WILLIAM N. RIDNER. 63

Subscribed and sworn to before me this 12th day of January, 1925.

WILLIAM A. HEGARTY,
Master in Chancery of New Jersey.

64 **Exhibit E.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, administrator *ad prosequendum* of the Estate of GEORGE GINSBERG, deceased,
Plaintiffs,

vs.

65 DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation,
Defendant.

Rule to Show Cause

Application having been made in the above entitled cause, upon due notice given, for a Rule to Show Cause, why the verdict and judgment entered in the above cause should not be set aside upon the ground of newly discovered evidence and perjury and argument having been heard thereon and the court having considered the same as well as the affidavits filed by the respective parties herein, and for good cause shown, it is on this
66 28th day of April, 1925,

ORDERED, that the said defendant show cause on the fifth day of May, 1925, before the Honorable John Bellstab, at the Post Office Building, in the City of Newark, County of Essex, and State of New Jersey, at ten-thirty o'clock in the forenoon, (daylight saving time) or as soon thereafter as counsel may be heard, why the verdict and judgment entered in the above

entitled cause should not be set aside and a new trial granted; and it is further ORDERED, that the affidavits read in support of and against this motion be filed with the clerk of this court forthwith; and it is further ORDERED, that evidence be taken in support of and against this motion before me on that day, and that a true copy of this order be served upon the defendant within 2 days of the date hereof; and that 2 days' notice of the taking of said testimony be given by the said plaintiff to the said defendant. 67

JOHN RELLSTAB,
Judge of the U. S. District Court,
District of New Jersey.

Dated March 30, 1925 68
On Motion of

Approved as to form.
F. B. SCOTT,
Attorney of Defendant.

69

70 **Exhibit F.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

DAVID GINSBERG; HARRY GINSBERG, by DAVID GINSBERG, his next friend; and DAVID GINSBERG, Administrator of the Estate of GEORGE GINSBERG, deceased,

Plaintiffs,

71 AGAINST

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant.

Action at Law.

Application to Open Judgment.

ANSWERING AFFIDAVITS.

STATE OF NEW JERSEY, County of Essex, } ss:

FREDERIC B. SCOTT, being duly sworn, on his oath says: That he is the attorney of The Delaware, Lackawanna and Western Railroad Company, the defendant in 72 the above entitled action.

This deponent says that the above entitled action was brought against the defendant on account of an accident wherein a locomotive of the defendant came in contact with an auto-truck being driven by the plaintiff David Ginsberg, and that as a result of said collision said David Ginsberg was injured, his son George Ginsberg killed, and another one of his children, Harry, received some minor injuries. The cause was first tried in December, 1921, before the Hon. Joseph L. Bodine and a jury

sitting in Newark and resulted in a verdict of $22,500 in favor of the plaintiffs. Subsequent to the rendition of this judgment the defendant obtained a rule to show cause from the Hon. Joseph L. Bodine on the ground that the plaintiff David Ginsberg had caused two of his witnesses, Addie Ridner and William N. Ridner, her husband, to commit perjury on the trial of said cause. Judge Bodine thereafter referred the matter to the United States Commissioner John M. Emery to take testimony on said rule to show cause and report his determinations to the Court. 73

This deponent further says that as a result of the report of the said John M. Emery Judge Bodine on June 5, 1922, set said verdict aside on the ground of the perjury committed by the plaintiffs' witnesses Addie and William Ridner, and at the time he set said verdict aside he directed this deponent as an officer of the Court to lay the said matter before the United States Grand Jury, which this deponent did, through the United States District Attorney for the District of New Jersey, as a result of which the plaintiff David Ginsberg was indicted by the United States Grand Jury as well as were his two witnesses, Addie and William Ridner. 74

This deponent further says that after said verdict was set aside and a new trial granted to the defendant, said cause was again noticed for trial with the result that it was tried before Honorable John Rellstab and a jury at Trenton and resulted in a verdict for the defendant, which verdict the said Judge refused to disturb by a rule to show cause, and the plaintiff thereafter reviewed said judgment in favor of the defendant by writ of error to the Circuit Court of Appeals, which Court on February 18, 1924, affirmed the judgment rendered in favor of the defendant. 75

This deponent further says that on the trial of said cause before the Honorable John Rellstab at Trenton, New Jersey, the plaintiff was represented by Harry Kalisch of

76 the firm of Kalisch & Kalisch, the plaintiffs' attorneys, he having been one of the attorneys who took an active part in part of the examination of the witnesses produced by the defendant on the hearing before United States Commissioner John M. Emery. That in the opinion of this deponent the said Harry Kalisch was familiar with the testimony of the Ridner witnesses first produced by the plaintiff as his witnesses on the trial of said cause at Newark and subsequently produced by the defendant on the examination before United States Commissioner John M. Emery.

Deponent further says that on the second trial of the above entitled cause, before Honorable John Rellstab at
77 Trenton, the defendant produced as its witnesses the said Addie Ridner and William Ridner and on the trial of said cause, well knowing that the said Addie Ridner had given different testimony on the first trial of said cause, this deponent, so that the jury trying said second cause should have the entire situation laid before it, propounded to said witness Addie Ridner the following question:

> "Q. Did the testimony that you gave at that trial with respect to the bell and whistle, was that the same as you have given today?"

to which question the plaintiffs' attorney, Mr. Harry Kalisch, objected in this form:

78 "Mr. Kalisch: Don't answer this. I object to it. I don't know whether or not he is trying to impeach his own witness or not, but I don't see what difference it makes what testimony she gave at the last trial.

"The Court: It doesn't appear so now. Of course, a court cannot assume you are trying to impeach your own witness. As the matter now stands it does not appear to be a proper question."

This deponent further says that cross-examination on the second trial of the said Ridner witnesses by the said

Harry Kalisch on behalf of the plaintiffs did not seek in 79
any way or manner to impeach their testimony on the ground that they had testified differently on the first trial of said cause when they appeared as witnesses for the plaintiffs.

Deponent further says that for reasons best known to the United States District Attorney the trial of the indictment against the said plaintiff herein, David Ginsberg has never been had, but that this deponent is informed that said cause has been set for trial by the United States District Attorney at Trenton for Tuesday, March 31, 1925, and this deponent verily believes that the present application of the plaintiff to open up the civil judgment rendered against the plaintiffs and in favor of the 80
defendant is merely a move on behalf of the plaintiffs in some way or manner to aid them in the trial of the indictment against David Ginsberg, and is not in truth and good faith an application presented to this Court with any reasonable expectation of having this Court disturb said civil judgment.

This deponent further says that annexed to this affidavit are the affidavits of William N. Ridner and of his daughter Mrs. Mary Berry, verified March 26, 1925, showing the way and manner in which the affidavit of William N. Ridner attached to the plaintiff's present application was obtained from him. In view of the fact that said William Ridner is a witness for the Government in the trial of the said plaintiff David Ginsberg for subornation 81
of perjury said affidavits of said William Ridner and Mary Berry clearly indicate that an effort is being made to interfere with the due and lawful administration of justice.

FREDERIC B. SCOTT

Subscribed and sworn to before me this 30th day of March, 1925.

HERBERT CLARK GILSON
Master in Chancery of N. J.

82 **Exhibit G.**

MARCH 26, 1925.

STATE OF NEW YORK }
County of New York }

WILLIAM N. RIDNER, being duly sworn, deposes and says; that he is 43 years of age; that he resides at Kenvil, County of Morris, State of New Jersey; that he is the husband of ADELINE RIDNER who lives at Lake Hopatcong; that he is the father of SETH RIDNER who lives with his mother at Lake Hopatcong and that he is the father of MRS. MARY BERRY, wife of ALFRED BERRY with whom he resides at Kenvil; that he now lives with his daughter
83 at Kenvil for the reason that he has been working for the Hercules Powder Co., at that place, Kenvil being 10 miles distant from Lake Hopatcong where his wife resides. He further says that the statement which he signed on the 12th day of January 1925 at the office of WILLIAM HEGARTY, Master in Chancery, at Morristown, N. J., is false and was obtained under duress and by threats by one, JACOBSON, in the interest of protecting DAVID GINSBERG. WILLIAM RIDNER further states that this man JACOBSON came to his daughter's house at Kenvil in the early part of January 1925 to talk about the GINSBERG case and asked him to make a statement. He said he was a friend of GINSBERG's
84 and wanted to keep him out of jail and that it was up to RIDNER to help him do so. This man, JACOBSON, also told WILLIAM RIDNER that if on account of his making a statement clearing GINSBERG, he RIDNER, would be sent to Jail, he JACOBSON would see that RIDNER did not go to jail but that he would go to jail for him. WILLIAM RIDNER further states that he at first refused to make the statement and that then JACOBSON threatened him and told him if he would not make a statement clearing GINSBERG, he RIDNER, would surely go to jail. This was said in the

presence of SETH RIDNER, WILLIAM RIDNER'S son and MRS. MARY BERRY, his daughter. MR. WILLIAM RIDNER further states that JACOBSON came again a few days later and threatened him and RIDNER because of his being in a weak condition from sickness got scared and went with JACOBSON to Morristown to the office of MR. HEGARTY. At this place JACOBSON dictated a statement to suit himself. JACOBSON read the statement to him, RIDNER, but as it did not contain the facts as RIDNER had stated, he, RIDNER, protested but JACOBSON paid no attention to that and said "sign this or you'll go to jail" and that he signed it. He further states MR. HEGARTY tried to get witnesses to sign their names to this statement but failed to do so and that further he, RIDNER, was not sworn as to the truth of the statement when he signed same. 85 86

This statement is made by me of my own free will and accord without threat or intimidation of any kind and without promise of reward.

I have also been advised of my rights in the premises.

WILLIAM N. RIDNER,

Sworn and subscribed to before me this 26 day of March, 1925. } WILLIAM N. RIDNER

JOSEPH FIELL,
Notary Public—New York County

[SEAL] Expires 3 30 25 87

Witness—
JNO. C. UP DE GROVE.

88 **Exhibit H.**

MARCH 26, 1925

STATE OF NEW YORK }
County of New York }

MRS. MARY BERRY being duly sworn, deposes and says: that she is 18 years old; that she is the wife of ALFRED BERRY and resides at Kenvil, Morris County, State of New Jersey. She states that some time in the early part of January 1925 a man who said his name was JACOBSON and claiming to be an insurance agent came to her house in Kenvil to see her father, WILLIAM RIDNER; that JACOBSON stated to her father that he
89 wanted him to go to Morristown and sign a statement that at the time of the accident to GINSBERG he was not there and therefore did not hear a bell ring or a whistle blow and if he would do this the case of the Government against GINSBERG would be quashed and further that if the Railroad Company was after him, WILLIAM RIDNER, he would guarantee that he would not go to jail but that if anybody went to jail he, JACOBSON, would go in her father's place. JACOBSON further said to her father that if he did not go to Morristown and sign a paper of this kind he would see that he went to jail.

This statement is made by me of my own free will and accord without threat or intimidation of any kind
90 and without promise of reward.

I have also been advised of my rights in the premises.

MRS. MARY BERRY
MRS. MARY BERRY

Sworn and subscribed to before me this 26 day of March, 1925,

JOSEPH FIELL

[SEAL] Notary Public—New York County
Expires 3-30-25

Witness
Jno. C. Up de Grove,

Exhibit I.

91

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

DAVID GINSBERG, HARRY GINSBERG, by DAVID GINSBERG, his next friend, and DAVID GINSBERG, Administrator *ad prosequendum* of the Estate of GEORGE GINSBERG, deceased,
Plaintiffs,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

On Rule to Show Cause.

Order.

92

A Rule to Show cause having been allowed, why the verdict entered in the above entitled cause on March 3, 1923, and the judgment entered thereon on June 20, 1923, should not be set aside and a new trial granted upon the ground of newly discovered evidence and perjury; and the Court having heard evidence and argument by counsel, and having duly considered the same, and it appearing that on the retrial of the cause, fraud and perjury was committed by Wm. N. Ridner a witness called by the plaintiffs, the first time and by the defendant in the retrial and that said fraud and perjury on the retrial was not brought to the attention of the plaintiffs until after the Circuit Court of Appeals had decided the issue on appeal adversely to the plaintiffs and said plaintiffs having made their application with due diligence after

93

94 the said fraud and perjury were brought to their attention, it is on this ninth day of May, 1925,

ORDERED that the said Rule to Show cause be made absolute and that the verdict and judgment rendered on said cause be set aside and a new trial granted.

JOHN RELLSTAB,
Judge.

95

96

Rule to Show Cause. 97

IN THE

UNITED STATES CIRCUIT COUET OF APPEALS

FOR THE THIRD CIRCUIT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

vs.

JOHN RELESTAB, Judge of the United States District Court for the District of New Jersey and the United States District Court for the District of New Jersey. 98

And now, this 13th day of July, 1925, upon consideration of the petition of the Delaware, Lackawanna & Western Railroad Company,

IT IS HEREBY ORDERED that a rule be granted on respondents herein to show cause why a writ of mandamus should not issue as prayed for in said petition; returnable on October 7, 1925, at 10 A. M. 99

Philadelphia, Pa.

Per Curiam,

BUFFINGTON,
Circuit Judge.

100 **Affidavit filed in response to Rule to Show Cause.**

UNITED STATES CIRCUIT COURT OF APPEALS.

DAVID GINSBERG, *et als.*, Plaintiffs, vs. DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO., Defendant.	On Petition for Mandamus.

101

STATE OF NEW JERSEY, County of Essex, } ss.

HARRY KALISCH, of full age, being duly sworn upon his oath, deposes and says:

I am a member of the firm of Kalisch & Kalisch, attorneys of record for the plaintiff in the above entitled cause, and am and have been entrusted with the trial and appeals in said cause.

On the first and second days of March, 1923, said cause was tried before a jury in the United States District Court, District of New Jersey, at Trenton, New Jersey.

102 At said trial two certain witnesses were sworn and testified in behalf of the Delaware, Lackawanna & Western Railroad Co., William Ridner and Addie M. J. Ridner, his wife. Said William Ridner testified that the accident which is the subject of this suit occurred late in the evening between six and seven o'clock, and that he, the said William Ridner, had occasion to notice a train come up from Dover toward Chester, and that at that time he

was about fifty or sixty feet from the bridge or the tow- 103
path, and that he recollected that the said train blew a whistle and rang a bell, and the said Addie M. J. Ridner testified that on the day of the accident she was in the vicinity of the railroad crossing with her husband and that they had been out for a walk and were on their way home; that they were walking on the tow-path and that she saw a train coming up from Dover toward Chester, and that it was real late in the evening; that she noticed that the train gave bell and whistle signals and that she heard the whistle blow a couple of times, but that the bell rang until it, the train, had passed on over from where they were standing.

The jury in said cause after being unable to agree for 104
some time and remaining out over night, returned a verdict in favor of the defendant, Delaware, Lackawanna & Western Railroad Co. An appeal was then taken by the plaintiff based on certain trial exceptions, to the United States Circuit Court of Appeals, which said appeal was argued at the October Term, 1923, and the mandate of the Circuit Court affirming the judgment was entered in March, 1924.

In the month of March, 1923, I employed one Charles Whitnall, a detective, to make an investigation concerning the two witnesses, William Ridner and Addie Ridner; this was before the appeal to the United States Circuit Court of Appeals had been taken. The investigation dis- 105
closed nothing of importance and on April 15, 1924, I employed David Jacobsen to make a further investigation and said Jacobsen as a result of said investigation obtained a statement from one, William C. Smith and May Bailey. After obtaining said statement said Jacobsen continued his investigation and on January 12 and 13, 1925, succeeded in obtaining from William Ridner, who was the witness sworn in behalf of the defendant, and whose testimony is set forth, a sworn statement, and also

106 succeeded in obtaining a sworn statement from Seth Ridner, a son of the said William Ridner, a copy of which is Exhibit "C" and "D" in defendant's petition for a mandamus.

The plaintiff, David Ginsberg, is a man in poor circumstances, having been rendered so as a result of this litigation, and has been unable to pay out large sums of money in the constant employment of detectives, but has, however, himself personally made inquiries and investigations concerning the witnesses, William Ridner and Addie M. J. Ridner, which investigation has extended over a long period of time since the rendition of the verdict as above stated.

107 The statements secured and attached to this affidavit were not taken in my presence, nor were any of these statements secured as a result of my personal efforts.

That upon the presentation of the foregoing facts together with the sworn statements of said William Ridner and Seth Ridner referred to above, and upon due notice given to defendant, Judge Rellstab on the twenty eighth day of April, 1925, allowed a rule to show cause why the verdict and judgment entered in said cause should not be set aside and a new trial granted. Upon said application defendant submitted two affidavits touching upon the substantial merits of the application and nothing was then said upon the question of jurisdiction; and in allow-
108 ing said rule Judge Rellstab directed me to submit a copy of the order to defendant for his approval, which I did and defendant after making some minor changes in the order, concerning the taking of testimony under the order, returned the same to me and Judge Rellstab signed it after he also had made some trivial alterations.

The order to show cause was returnable May 5, 1925, and on that day both parties appeared by their counsel; the witnesses, William Ridner and Addie Ridner, appearing under subpoena; it being the expressed desire of

Judge Rellstab to hear both these witnesses in open court. When the matter was opened no objection was made by the defendant to the jurisdiction of the Court nor does the transcript or record show such objection until the very end of the proceedings when Judge Rellstab announced his determination to make the rule absolute; the entire matter was heard on its merits; the star witness being William Ridner; the defendant examining witnesses as well as the plaintiff, as will appear from the transcript. This said witness, William Ridner, on page 7 of the transcript testified as follows: 109

Q. Do you remember testifying as follows at the trial of Ginsberg against the Delaware Lackawanna: "While you were there did you have occasion to notice a train was coming up? A. Yes, sir. 110

"Q. And where were you at the time you noticed the train coming up? A. About fifty or sixty feet from the tow path or from the bridge.

"Q. From the bridge? A. Yes, sir.

"Q. On the tow path? A. Yes, sir.

"Q. Have you any recollection as to whether that train gave any signals either as to bell or whistle as it was approaching the crossing? A. They did blow.

"Q. They did blow? A. Yes, sir.

"Q. Have you any recollection as to whether the bell was ringing, I won't say how many times it blew, but with respect to the bell, have you got any recollection? A. Yes, the bell rang." 111

Q. Do you remember testifying that way at the trial? A. I remember something like, but I don't remember the exact words.

And on page 61, this same witness testified as follows:

Q. Where were you when this accident happened? A. I don't remember where I was.

Q. What? A. Home, I think.

112 Q. You were home and your wife was home, too, wasn't she? A. I think so.

And continuing, this witness further says at the bottom of page 61, top of page 62:

Q. At the time of the accident someone told you an accident took place down at the Kenvil Crossing, that is correct, isn't it? A. Yes.

Q. And how long after it had taken place did you go down there? A. A couple of days or so.

Q. You didn't go down before? A. No.

Q. That was the first you had seen the scene of the accident since it had happened, since the accident
113 happened? A. Yes.

And on page 89 this witness testified as follows concerning the affidavit which he made for the plaintiff and upon which the plaintiff based his plea for a new trial:

Q. In this affidavit that you made before Mr. Haggerty that said that he, meaning you, was at his home, your home, with his wife, your wife, when news of the accident was received on June 29, 1920, about eight P. M., in the evening, and up to that time he, that is you, didn't know about the accident and neither did his wife. Was that part of the affidavit false or other parts that you have reference to? A. Other parts.
114 Q. That is true, isn't it? A. Yes.

At the close of this witness' testimony the Court called both counsel and announced his determination to make the rule absolute, whereupon defendant's counsel *then* raised the question of lack of jurisdiction, and the Court formally disposed of the matter as follows:

The Court: As the matter stands before me, this application for setting aside of the verdict is founded

upon conditions that were not brought to the attention of the plaintiff until, after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late. 115

However, if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire.

It seems to me that without going into further testimony, there is enough disclosed by Ridner's testimony, to require the Court to make the rule absolute.

Counsel for the defendant in his affidavit attached to the petition for mandamus says: 116

"Deponent further says that for reasons best known to the United States District Attorney the trial of the indictment against the said plaintiff herein, David Ginsberg, has never been had, but that this deponent is informed that said cause has been set for trial by the United States District Attorney at Trenton for Tuesday, March 31, 1925, and this deponent verily believes that the present application of the plaintiff to open up the civil judgment rendered against the plaintiffs and in favor of the defendant is merely a move on behalf of the plaintiffs in some way or manner to aid them in the trial of the indictment against David Ginsberg, and is not in truth and good faith an application presented to this Court with any reasonable expectation of having this Court disturb said civil judgment." 117

The foregoing extract from defendant counsel's affidavit is not in accordance with the truth. Plaintiff, Ginsberg, has always been ready to stand trial, on the indictment, but for some unaccountable reason the United

States District Attorney has not seen fit to try the same. The last time the case was called for trial, which was March 31, 1925, Ginsberg appeared at Trenton with twenty witnesses which he brought from Morris County, ready to stand trial, and when the case was called I informed the Court that I was ready to proceed, but the District Attorney informed the Court that in view of the fact that a rule to show cause had been allowed in the civil suit on the ground of perjury, that the criminal suit would have to wait the outcome of the rule to show cause and that is the last time that the criminal case has been called for trial. Ginsberg is ready at any and all times to stand trial; and the reason that the District Attorney does not try the indictment is that the government, in view of the retraction of the main witness, Ridner, would be utterly unable to present its case as it is based upon the testimony of Ridner and his wife.

After all, the indictment grew out of the first trial, the verdict in which was set aside by Judge Bodine, and could have no bearing upon the case we are now considering. The indictment is only made use of by counsel for the defendant in an attempt to prejudice the mind of the Court against the plaintiff.

When plaintiff made his application to Judge Bellstab for a rule to show cause defendant submitted an answering affidavit signed by Ridner and marked Exhibit "G," in defendant's petition for mandamus. In that affidavit the following is alleged:

> "He further says that the statement which he signed on the twelfth day of January, 1925, at the office of William Hegarty, Master in Chancery, at Morristown, N. J., is false and was obtained under duress and by threats by one, Jacobsen, in the interest of protecting David Ginsberg."

When Ridner testified before Judge Rellstab on the return of the rule to show cause he gave the following testimony on pages 74 and 75. 121

Q. Do you know what "Duress" is? A. No.

Q. You don't know what that word means, do you? A. Duress?

Q. Yes. A. No.

Q. What do you mean by putting it in your affidavit here, "is false and is obtained under duress?" What do you mean by that, if you don't know what the word "duress" means. Who put that word in? A. I don't know.

and further on in the same affidavit Ridner said as follows: 122

"At this place Jacobsen dictated a statement to suit himself. Jacobsen read the statement to him, Ridner, but as it did not contain the facts as Ridner had stated, he, Ridner, protested but Jacobsen paid no attention to that and said 'sign this or you'll go to jail' and that he signed it."

before Judge Rellstab Ridner said as follows on pages 50 and 51:

Q. Did he tell you to go down and make a statement and to tell the truth? A. Who?

Q. Mr. Jacobsen, didn't he tell you that? A. Didn't he leave me? 123

Q. Answer my questions. Didn't he tell you what he wanted from you was the truth? A. Yes.

The Court: Who told you that? Who was it said that to you?

The Witness: Mr. Jacobsen.

and in the same affidavit appears the following in the handwriting of Ridner (see photostatic copy):

"I have also been advised of my rights in the premises."

124 before Judge Rellstab, Ridner testified as follows on pages 76 to 79:

Q. You don't know. You have in here "This affidavit is made by me of my own free will and accord and without intimidation." Did you use that word or didn't you? A. No.

Q. You did not? A. No.

Q. That was a word they put in? A. Somebody.

Q. Somebody. "I have also been advised of my rights in the premises." Do you know what the word "premises" means in connection with this affidavit? A. Premises?

Q. Yes. A. Living, where you are living.

125 Q. That is your idea of what that means? A. That is the way I understand it.

Q. So that when you made this statement in the affidavit, "I have also been advised of my rights in the premises," you think it means it should be this way, "I have been advised of my rights in the place I am living." That is the sense you get out of that? A. Yes.

Q. That is what you think that means? A. Yes.

Q. What do you mean by being advised of your rights, who advised you of your rights? A. What do you mean by that?

Q. Read it. That is your affidavit or a copy of

126 it. "I have also been advised of my rights in the premises." What do you mean by that? A. I don't remember.

Q. What? A. I don't remember.

Q. Did anyone advise you of your rights on that occasion? A. No.

Q. What? A. I don't remember of anybody.

Q. You don't remember anybody? What did you sign it for as an affidavit if no one advised you of your rights?

Mr. Scott: I object. That contains an unwar- 127
ranted assumption of fact. The witness says he doesn't remember it.

(Question read.)

The Court: I will allow the question.

Q. Do you understand the question? A. I don't remember what I said.

Q. What? A. What I signed it for?

Q. Yes, why did you say in your affidavit, "I have also been advised of my rights in the premises," if you were not advised of your rights? Why did you put it in there? Is it your language? A. I don't remember what I said. 128

Q. Is it your language, is that your language, what I have just read? Come, speak out. You don't need to hesitate about it. A. I don't remember——

Q. That is not your language, is it? A. No.

Q. What? A. No.

Q. Whose language is it? A. I don't know whose it is.

Q. Somebody in that office, wasn't it? A. I don't know whose it is.

Q. Whose language was it, Mr. Ridner, come and tell us the whole story? A. I don't know who it was.

I call the Court's attention to the fact that the affida- 129
vit which was made by him for the Delaware, Lackawanna & Western must have been obtained through intimidation, as it is at variance with what he testified to before Judge Rellstab, and he denies using or understanding the language contained in the affidavit.

It is to be noted that the verdict obtained by the plaintiff at the first trial was set aside upon application by the defendant upon the ground of perjury of the

same witness, and at the present trial the same kind of an application is made based upon the perjury of the same witness, and the only objection that counsel for the defendant makes upon this application is that it was not made at the term at which the verdict was rendered. He seeks through the aid of this Court to recover a judgment which is admittedly tainted with fraud and perjury.

This affidavit is made upon information and belief so far as the words and acts of other persons are concerned.

HARRY KALISCH.

Sworn and subscribed before me this twenty-sixth day of September, 1925.

LILLIAN DELTAN,
Notary Public of N. J.

Opinion denying Writ. 133

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

vs.

JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the United States District Court for the District of New Jersey,
Respondents. 134

No. 3379 October Term, 1925.

On Petition for writ of Mandamus to Hon. John Rellstab, Judge of the United States District Court for the District of New Jersey. 135

Before BUFFINGTON, WOOLLEY and DAVIS, Circuit Judges.

DAVIS, *Circuit Judge*. This is a petition for mandamus to direct Hon. John Rellstab to reinstate a judgment entered in the United States District Court on June 20, 1923, which was set aside by him on May 9, 1925, after

136 the expiration of a number of terms of court without extending the term in which the judgment was entered.

On December 9, 1920, David Ginsberg individually, as next friend of Harry Ginsberg and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action against the petitioner, the Delaware, Lackawanna and Western Railroad Company, to recover damages for injuries received by him and his two sons, Harry Ginsberg, and George Ginsberg, deceased, through its alleged negligent operation of one of its trains. David Ginsberg was driving a truck in Morris County, New Jersey, on the road leading from Wharton to Kenvil. The truck was struck at a point where the road crosses the
137 track of the petitioner and the father and one son, Harry, were seriously, and the other son, George, was fatally, injured. Suit was begun in the Supreme Court of New Jersey in the Morris Circuit and was removed on the ground of diversity of citizenship to the United States District Court for the District of New Jersey.

The cause was tried on December 2, 1921, and a verdict was rendered for plaintiff. At this trial Addie N. J. Ridner and William N. Ridner, her husband, testified on behalf of the plaintiff. The jury rendered a verdict for him and against the defendant. Some time after the entry of judgment, the Ridners stated, under oath, that their testimony at this trial was false and perjured. Thereupon the judgment was set aside and a new trial ordered.
138 The second trial was held on March 3, 1923, and at this trial they testified, in accordance with their statement, that their former testimony was false; that they were about fifty or sixty feet from the crossing when the collision took place and that a whistle was blown and a bell was rung before the train reached the crossing. The jury rendered a verdict for the defendant railroad company and against the plaintiff on which judgment was entered on June 21, 1923. This judgment was brought

to this court by writ of error of plaintiff. It was affirmed 139
and the mandate from this court was filed in the District Court on March 21, 1924.

The April term of the District Court of 1923, in which the judgment was entered, expired on the opening of the September term on Tuesday, September 11, 1923. The January term of 1924 of that court, in which the mandate from this court was filed in that court, expired Tuesday, April 8, 1924. Neither of the terms of the District Court ending September 11, 1923 and April 8, 1924 was extended by stipulation, court order or otherwise.

On January 12, 1925, William Ridner signed an affidavit in which he said that he was not at or near the crossing when the collision occurred, as he had testified, 140
and that he did not know of the accident until 8 o'clock in the evening of the afternoon on which it occurred and that he was told of it by a neighbor. An application based on this affidavit was made to Judge Rellstab for a rule to show cause why this last judgment should not be set aside. He allowed the rule on April 28, 1925, and on May 9, 1925, after hearing testimony in open court, he made it absolute and set aside the judgment on the ground that it was obtained through fraud. Thereupon counsel for the defendant railroad company petitioned this court for a writ of mandamus directing Judge Rellstab to reinstate the judgment.

Two questions arise: First, whether or not we have 141
jurisdiction to issue the writ of mandamus, and, second, whether or not the District Court lost jurisdiction over the judgment with the expiration of the term in which it was entered.

The Circuit Court of Appeals is a statutory court and its authority to grant writs must be found in the statute if it exists. Section 12 of the Act creating the Circuit Court of Appeals (26 Stat. 826, 828) provides that it shall have the powers specified in section 716 of the Revised

142 Statutes of the United States. This section has been re-enacted in section 262 of the Judicial Code and provides that:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

There is no statute specifically giving this court power to issue the writ of mandamus. Its jurisdiction is purely appellate and it has no power to issue the writ except in
143 aid of, or when it is necessary for the exercise of, its appellate jurisdiction. Is this writ in aid of, or necessary for the exercise of, its jurisdiction?

When the judgment was set aside, nothing was pending in this court or the District Court. The term in which final judgment had been entered in the District Court, as above stated, had long since expired without any extension of any kind. If we dismiss the rule, the case may possibly reach this court again, but if the judgment is reinstated, the case will remain final in that court and will never come into this court. The reinstatement of the judgment, therefore, cannot be in aid of the jurisdiction of this court. Accordingly, we have no power to issue
144 the writ. Tryon v. Pennsylvania Railroad Company, 213 Fed. 49; *In re* Dennett, 215 Fed. 673; Whitney v. Dick, 202 U. S. 132, 137, 138; McClellen v. Garland, 217 U. S. 268; United States v. Mayer, 235 U. S. 55.

The petitioner is seeking by writ of mandamus what can be had only by writ of error. Upon a writ of error taken after final judgment, this court may require the District Court to reverse its decision and decide a case in a particular way, but this it cannot do by mandamus. *Ex parte* Loring, 94 U. S. 165; *Ex parte* Railway Com

pany, 103 U. S. 794; *Ex parte* Hoard, 105 U. S. 578; 145
In re Pollitz, 306 U. S. 323, 331, 333; *In re* Metropolitan Trust Co., 218 U. S. 312, 319; Maryland v. Soper, 270 U. S. 9, 29.

On the second question, "in the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term". United States v. Mayer, 235 U. S. 55, 67. Whether or not the allegation of fraud in the judgment which was set aside is an exception to this rule may be a question, but be that as it may, mandamus under the facts in this case is not the legal method by which that question may 146
be determined. Therefore, the rule is DISMISSED.

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148 **Order Discharging Rule to Show Cause.**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,
Petitioner,

vs.

149 JOHN RELLSTAB, Judge of the United States District Court for District of New Jersey, and the United States District Court for the District of New Jersey.

A rule to show cause having been allowed on the thirteenth day of July, 1925, upon consideration of the petition of Delaware, Lackawanna & Western Railroad Co., to show cause why a writ of mandamus should not issue as prayed for in said petition returnable on October 7, 1925, and Frederic B. Scott, appearing for the rule and
150 Kalisch & Kalisch, appearing *contra*, and argument having been heard thereon and the Court having duly considered the same, it is on this 25th day of September, 1926,

ORDERED that the said rule to show cause be dismissed and discharged and that said application be and the same is hereby denied with costs.

J. WARREN DAVIS,
Circuit Judge.

Clerk's Certificate.

151

United States Circuit Court of Appeals for the Third Circuit, ss:

I, SAUNDERS LEWIS, JR., Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify that the foregoing transcript of the record of the proceedings of this Court in the within entitled case is a true, correct and complete transcript of said record as the same now appears in this Court.

SAUNDERS LEWIS, JR.,
Clerk, United States Circuit Court
of Appeals for the Third Circuit. 152

153

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 13, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted] 141

Office Supreme Court, U. S.
FILED
NOV 11 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

against

HONORABLE JOHN RELLSTAB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Respondents.

ACTION AT LAW.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

FREDERIC B. SCOTT,
Attorney for Petitioner.

[redacted] Printing and Publishing Office, Inc., 234 Fulton St., New York, N. Y.

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

AGAINST

Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,
Respondents.

October Term, 1926.

Comes now The Delaware, Lackawanna and Western Railroad Company, by Frederic B. Scott, Esq., its Attorney, and moves this Honorable Court that it shall, by certiorari or other proper process, directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, to require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein Hon. John Rellstab, Judge of the United States District Court for the District of New Jersey, and the United States District Court for the District of New Jersey were respondents and your petitioner, The Delaware, Lackawanna and Western Railroad Company, petitioner, and to that end, it now tenders herewith its petition and brief with a certified copy of the entire record in said cause of said Circuit Court of Appeals.

FREDERIC B. SCOTT,
Attorney.

SUPREME COURT OF THE UNITED STATES

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,	October Term, 1926.
AGAINST	
Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, Respondents.	PETITION.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, The Delaware, Lackawanna and Western Railroad Company, respectfully shows unto this Honorable Court:

I. That your petitioner is a corporation, organized and existing by virtue of the laws of the State of Pennsylvania, and is a citizen of that state.

II. That on the ninth day of December, 1920, David Ginsberg, individually and as next of friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey, in the Morris Circuit thereof, for personal injuries to the said David Ginsberg and Harry Ginsberg, and on account of the death of George Ginsberg, for the alleged negligent acts of the agents and servants of your petitioner, in running into and upon said named parties a locomotive operated by your petitioner.

III. Your petitioner further shows that on December 28th, 1920, said cause was removed to the United States District Court for the District of New Jersey, on account

of diversity of citizenship wherein issue in said cause was subsequently joined in said action and the case duly noticed for trial.

IV. Your petitioner further shows that on December 2nd, 1921, at the September, 1921, Term of the District Court, said cause was tried and resulted in a verdict for the plaintiffs in said action, which verdict was subsequently set aside by said Court and a new trial granted your petitioner.

V. Your petitioner further shows that thereafter at the January, 1923, Term of Court, said cause was again brought on for trial and on March 3rd, 1923, the jury in said cause rendered a verdict for the defendant and that after the denial by said Court of an application by the plaintiffs for a new trial, rule for judgment final for the defendant, with costs, was entered in the said District Court on June 21st, 1923.

VI. Your petitioner further shows that thereafter, on August 27th, 1923, the plaintiffs in said action filed their assignments of error and petition for a writ of error to the United States Circuit Court of Appeals for the Third Circuit, which writ of error was allowed and said cause removed to the said United States Circuit Court of Appeals for the Third Circuit for review, and that on March 21st, 1924, the mandate of said Court, affirming the judgment of the District Court in favor of your petitioner was filed with and in the said District Court.

VII. Your petitioner further shows that at no time during the term at which judgment final for your petitioner was rendered in the District Court did the District Court extend said term, nor did the attorneys for the respective parties to said action stipulate or file any stipulation in the District Court, extending the term in which said judgment final was rendered, and that the said April, 1923, Term of said District Court expired on the day previous to the opening of the September, 1923, Term of said Court, which according to the statute in such cases made and provided and the rules of

said District Court, commenced on the second Tuesday in September, 1923.

VIII. Your petitioner further shows that, even after the mandate of the United States Circuit Court of Appeals for the Third Circuit, affirming the judgment for your petitioner, in the above Court, came down and was filed in the District Court on March 21st, 1924, which was during the January, 1924, Term of said District Court, and which Term, according to the statute in such cases made and provided, and the rules promulgated by said District Court, expired on the day preceding the first Tuesday in April, 1924, said plaintiffs did not extend said January, 1924, Term of said District Court, either by stipulation with your petitioner or by any order of said Court, and that the said January, 1924, Term of said District Court expired without it in any way or manner being extended, all of which facts appear in the transcript of the record accompanying this petition.

IX. Your petitioner further shows that on the first trial of said cause in the District Court, the reason why said District Court set aside the verdict rendered in favor of the plaintiffs and against your petitioner, was for and on account of certain perjured testimony given on the trial of said cause on behalf of the plaintiffs in said cause by two witnesses, one Addie Ridner and the other William Ridner.

X. Your petitioner further shows that on the second trial of said cause, which resulted in a verdict for your petitioner, your petitioner produced the said Ridners as witnesses on its behalf and, although the said plaintiffs and their attorney were well aware of the fact that said Ridners had given testimony on the first trial of said cause when they appeared for the plaintiffs, which was contradictory to the testimony said witnesses gave on behalf of your petitioner on the second trial of said cause, neither said plaintiffs nor their attorney in any way or manner sought to impeach the veracity or credibility of said Ridners on the second trial of said cause.

XI. Your petitioner further shows that on March 30th, 1925, the plaintiffs in said action in the District Court filed two affidavits with the Clerk of said Court, of which true copies are set out in the accompanying transcript of the record, and that the William Ridner who made one of said affidavits is the William Ridner hereinafter referred to, and was a witness for the plaintiffs on the first trial of said cause, and a witness for your petitioner on the second trial of said cause.

XII. Your petitioner further shows that on the filing of said affidavits and a notice of application to your petitioner to be made to the Honorable John Rellstab, Judge of the District Court for the District of New Jersey, said Honorable John Rellstab did on April 28, 1925, allow said plaintiffs a rule to show cause why the judgment in favor of your petitioner which as heretofore set forth is shown to have been entered on June 21st, 1923, should not be set aside and a new trial granted, and that your petitioner at said time, to wit, on March 30th, 1925, filed answering affidavits, which also appear in said transcript.

XIII. Your petitioner further shows that, pursuant to said rule to show cause allowed said plaintiffs, notice of the taking of testimony thereunder was given your petitioner and that on May 5th, 1925, testimony was taken on said rule to show cause before the Honorable John Rellstab, and said rule to show cause was made absolute by the said Honorable John Rellstab, by his order of May 9, 1925, a copy of which appears in said transcript; although on the hearing of said testimony, the said Honorable Joseph Rellstab recognized that the said District Court may have lost jurisdiction over the verdict rendered in favor of your petitioner and the judgment final entered thereon on June 21, 1923.

XIV. Your petitioner further shows that, being advised that the said Honorable John Rellstab, Judge of the United States District Court for the District of New Jersey and said United States District Court for the District of New

Jersey had no right or authority to disturb or set aside the verdict and judgment entered thereon in favor of your petitioner on June 21, 1923, because the said District Court had lost jurisdiction of said cause, the Term of which District Court, in which said judgment final was rendered in favor of your petitioner, having long since expired and not having been extended either by stipulation between any of the parties thereto or any order of the Court in the premises, on the 13th day of July, 1925, it obtained from the United States Circuit Court of Appeals for the Third Circuit a Rule to Show Cause why a mandamus should not issue against the respondents herein for the purpose of directing and commanding them to reinstate the judgment entered in said District Court in favor of your petitioner, and that said Rule to Show Cause thereafter duly came on for argument, in the United States Circuit Court of Appeals for the Third Circuit on the 4th day of December, 1925, and, after due consideration thereof by said Court, said Court did, on the 25th day of September, 1926, in its opinion filed in said cause, as appears in the accompanying transcript record, dismiss your petitioner's Rule to Show Cause for reasons therein set forth, and thereupon entered its order in the premises declining to issue said mandamus, although your petitioner verily believes that the said United States Circuit Court of Appeals for the Third Circuit was in error and should be reversed, in that it appears that the original action commenced in the United States District Court for the District of New Jersey may have been taken on appeal to the United States Circuit Court of Appeals, in that the suit involved over Three Thousand Dollars ($3,000) in amount and was between citizens of different states; that said case was one within the appellate jurisdiction of the United States Circuit Court of Appeals, and that it should have directed the issuance of the Writ of Mandamus to the respondents.

XVI. Your petitioner believes that the aforesaid judgment of the United States Circuit Court of Appeals is erroneous and that this Honorable Court should require the said

case to be certified to it for a review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to prepare and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Third Circuit in the said case therein, entitled the Delaware, Lackawanna and Western Railroad Company, Petitioner, versus Honorable John Rellstab, Judge of the United States District Court for the District of New Jersey and the United States District Court for the District of New Jersey, Case No. 3379, to the end that the said case may be reviewed and determined by this Court, as provided in judicial Code Section 240, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act and that the said judgment of the said United States Circuit Court of Appeals for the Third Circuit in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
By FREDERIC B. SCOTT,
Its Attorney.

STATE OF NEW YORK, }
County of New York, } ss:

FREDERIC B. SCOTT, being duly sworn, says, that he is counsel for The Delaware, Lackawanna and Western Railroad Company, the petitioner named in the foregoing petition, and as such has had charge for it of the case in the petition mentioned in the District Court of the United States for the District of New Jersey, and in the United States Circuit Court of Appeals for the Third Circuit; that he has read said petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

FREDERIC B. SCOTT.

Subscribed and sworn to before me this First day of November, 1926

JOSEPH FIELL,
Notary Public New York County No. 49.
Commission expires March 30, 1927.

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IN THE

SUPREME COURT OF THE UNITED STATES

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,	October Term, 1926.
AGAINST	
Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, Respondents.	Action at Law.

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

Statement of Case.

On December 9th, 1920, David Ginsberg, individually, and as next friend of Harry Ginsberg, and as Administrator *ad Prosequendum* of the Estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey, for personal injuries and damages which the said David Ginsberg and Harry Ginsberg were alleged to have suffered and for the pecuniary loss suffered on account of the death of George Ginsberg for the alleged negligent acts of the agents and servants of the Railroad Company in running into and upon said parties a locomotive operated by the agent of the Railroad Company while said parties were endeavoring to pass over a railroad grade crossing in an automobile.

NOTE. Except where otherwise stated italics are ours.

On account of the diversity of citizenship of the parties, the case was removed from the State Court to the United States District Court for the District of New Jersey, where issue was subsequently joined and the case duly noticed for trial.

On December 2nd, 1921, at the September Term of the District Court, the trial of the cause was completed, resulting in a verdict for all the plaintiffs in said action, which verdict was subsequently set aside by the Trial Court and a new trial granted the Railroad Company, on account of the subornation of perjury by the plaintiff, David Ginsberg, of two of his witnesses on said trial by the names of Addie Ridner and William Ridner.

Subsequently said cause was again tried and on March 3rd, 1923, at the January Term of the District Court, the jury rendered a verdict for the defendant Railroad Company, a new trial in which matter was denied by the Trial Judge, who is one of the respondents in this proceeding, and a rule for final judgment with costs was entered in the District Court on June 21st, 1923, R. p. 31.

The plaintiff, David Ginsberg, subsequently took a writ of error to the Circuit Court of Appeals for the Third Circuit.

On March 21st, 1924, the mandate of that Court, affirming the judgment of the District Court in favor of the petitioner Railroad Company, was filed in the District Court, R. p. 31.

At no time during the Term at which the judgment final in favor of the petitioner Railroad Company was rendered in the District Court was there any order of the said District Court, extending said Term, nor did the respective parties to said action stipulate or file any stipulations in the District Court, extending the Term in which said judgment final was rendered; neither did the District Court, after the mandate of the Circuit Court of Appeals for the Third Circuit was filed, on March 21st, 1924, extend said Term; nor did the attorneys for the respective parties, by stipulation, extend the Term in which the mandate from the Circuit Court of

Appeals for the Third Circuit was filed with the District Court; and the said Term in which the mandate from the Circuit Court of Appeals for the Third Circuit came down and was entered in the District Court likewise expired without an extension of said Term, R. p. 13.

The reason why the District Court set aside the verdict on the first trial of the cause rendered in favor of the plaintiff, Ginsberg, and against the petitioner Railroad Company was on account of certain suborned and perjured testimony given on the trial of said cause on behalf of the plaintiffs by two of the plaintiffs' witnesses, namely: Addie Ridner and William Ridner.

On the second trial of said cause, which resulted in a verdict for the petitioner Railroad Company, the petitioner, instead of the Ginsbergs produced the witnesses Ridners and, although the plaintiffs and their attorneys were well aware of the fact that the said Ridners had given false testimony on the first trial of said cause, when they appeared for the plaintiffs, which was contradictory to the testimony said witnesses gave on behalf of the petitioner railroad company on the second trial of said cause, neither the plaintiffs, nor their attorneys in any way or manner sought to impeach the veracity or credibility of said witnesses on the second trial of said cause, although opportunity was accorded them.

On March 30th, 1925, the plaintiff Ginsberg sought to impeach the verdict in favor of the petitioner Railroad Company by filing with the Clerk of the District Court two affidavits, one by the witness, William Ridner, purporting to show on behalf of the witness, William Ridner that he testified on the second trial of said cause false for the petitioner Railroad Company and another affidavit by Ridner's son, Seth, in which he endeavored to show that the accident to the plaintiffs was caused in a manner as would place liability upon the Railroad Company.

After taking testimony in open Court before the respondent, the Honorable John Rellstab, the respondent, granted the Ginsbergs a new trial in said matter to the prejudice of the petitioner Railroad Company.

Exhibit "A" in the transcript of the record of the Circuit Court of Appeals for the Third Circuit, p. 8, accompanying this petition, is the docket entries of the District Court concerning the case involved and an examination of it shows that the Terms of said Court in which said cause was pending were never extended after final judgment was rendered on June 21st, 1923, nor during the Term in which the mandate of the Circuit Court of Appeals for the Third Circuit, affirming the judgment in favor of the petitioner Railroad Company was filed in the District Court, those facts being uncontradicted and undisputed.

On July 13th, 1925, the Circuit Court of Appeals for the Third Circuit allowed the petitioner a Rule to Show cause why a mandamus should not issue to the respondents, the Honorable John Rellstab, Judge of the United States District Court for the said District and said District Court directing the respondents to reinstate the judgment so set aside.

Argument was had on said Rule to Show Cause in the Circuit Court of Appeals for the Third Circuit on December 4th, 1925, and on September 25th, 1926, the Circuit Court of Appeals for the Third Circuit filed its opinion, R. 45, dismissing and discharging the petitioner Railroad Company's application for a mandamus on the ground that it had no power to issue said writ, although it was undisputed that at the time the District Court set aside said judgment, the respondent, the Honorable John Rellstab, assumed to act in the premises at a time after the expiration of the Term in which final judgment had been rendered, which Term had in no way or manner been extended, R. p. 47.

Statement of Question Involved.

The question involved in this application is whether the Circuit Court of Appeals for the Third Circuit had the authority to and should have issued a writ of mandamus directed to a District Court and one of its Judges, when said Judge had set aside a verdict in favor of the petitioner more

than four terms after said judgment was entered, there never having been any order made by the District Court or any of its Judges extending the Term in which said judgment was entered; neither were any stipulations entered into or filed by the respective parties to the litigation which terminated in a final judgment extending the Term in which the said judgment final was rendered.

Argument on Behalf of the Petitioner.

The Circuit Court of Appeals denied the petitioner Railroad Company's application for the mandamus because of its decision that it had no power to issue the writ, it saying:

> "When the judgment was set aside, nothing was pending in this Court or the District Court. The Term in which the Federal judgment had been entered in the District Court, as above stated, had long since expired without any extension of any kind. If we dismiss the order, the case may possibly reach this Court again, but if the judgment is reinstated, the judgment will remain final in that Court and will never come into this Court. The reinstatement of the judgment, therefore, can not be in aid of the jurisdiction of this Court. Accordingly, we have no power to issue the writ" R. p. 48.

From the reasoning of the Circuit Court of Appeals, it appears that that Court lost sight of the fact that the judgment which the lower Court disturbed was its own judgment, and not that primarily entered by the Court below, because the Circuit Court of Appeals, affirmed the judgment in favor of the petitioner, their decision thereon being reported in 296 Federal 439 and thereafter issued its mandate that said judgment be carried out, which mandate was filed in the District Court on March 21st, 1924, R. p. 11.

Southard, et al v. *Russell*, 16 Howard, 570, being authority for the contention that such was the status of judgment entered in the District Court, your Honorable Court speaking through Mr. Justice Nelson, saying:

> "The decree sought to be set aside by this bill of review in the Court below was entered in pursuance of

an appeal in the original suit. *It is, therefore, the decree of this Court, and not that primarily entered by the Court below, that is sought to be interfered with.*"

Any interference by the District Court with the judgment of the Circuit Court of Appeals, either by way of rule to show cause for the granting of a new trial, rehearing or review, was only permissible after the proper application had been made to and allowed by the Circuit Court of Appeals, for, as your Honorable Court has said, *In re Potts*, 166, U. S. 263, speaking through Mr. Justice Gray (pp. 265-266):

> "The general rules which govern cases of this kind are stated and the decisions by which those rules have been established are collected in the recent case of Sanford Fork and Tool Company, petitioner, 160 U. S., 247, in which this Court said:
>
> 'When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the decree as well as the law of the case and must carry it into execution according to the mandate. That court can not vary it or examine it for any other proofs for execution or give any other or further relief or review it, even for apparent error in matter decided upon appeal or intermeddle with it, other than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues a decree of this Court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal, if involving a sufficient amount, or by a writ of mandamus to execute the mandate of this Court; but the Circuit Court may consider and decide any matters left open by the mandate of this Court and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this Court at the time of rendering this decree may be consulted to ascertain what was intended by its mandate, and, either upon an application for a writ of mandamus or upon a new appeal, it is for this Court to construe its own mandate and act accordingly.'"

"* * * When the merits of a case have been once decided by this Court upon appeal, the Circuit Court has no authority, without express leave of this Court, *to grant a new trial*, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer." (*Cases cited.*)

"In this respect, a motion for a new tria' or petition for a rehearing stands upon the same ground as a bill of review." * * *" 267.

The District Court, or its Judges can not, to use the expression of your Honorable Court "intermeddle with it further than to settle so much as has been remanded."

In re Potts, 265, *supra.*

The Circuit Court of Appeals still retains its jurisdiction to see that its mandate is carried out as was done by the Circuit Court of Appeals for the Third Circuit itself in *Herold* v. *Kahn, et al.*, 163 Fed., 947-8, where it recognized the practice herein contended for, although not under circumstances similar to your Honorable Court's action in the case of *In re Potts, supra.*

The instant case was one within the appellate jurisdiction of the Circuit Court of Appeals for the Third Circuit to issue a writ of mandamus in aid of its appellate jurisdiction, which might otherwise have been defeated by the unauthorized action of the Court below, if we read correctly what your Honorable Court has said in *McClellan* v. *Carland*, 217 U. S., 268, where, speaking through Mr. Justice Day, it wat said:

"It is further objected that the Circuit Court of Appeals had no jurisdiction to issue the writ of mandamus as that writ can only be issued in aid of the appellate jurisdiction of the Circuit Court of Appeals, and it is contended, as that Court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed.

"Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in Section 716 of the Revised Statutes of the United States. This section we have already had occasion to quote, and when read in connection with Section

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IN THE

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

AGAINST

Honorable JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,
Respondents.

October Term, 1927.
No. 141.

BRIEF FOR PETITIONER.

This case comes before the Court upon writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, granted December 13, 1926.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 15 Fed. [2d], 137.

The District Court rendered no opinion, but made an order which appears at pages 31 32 of the Record.

Jurisdiction of the Court.

This Court has jurisdiction of the above entitled case under United States Code, Title 28, Chapter 9, § 347 (former Judicial Code, § 240).

The order to be reviewed is dated September 25, 1926 (R. p. 50). It dismissed and discharged a rule to show cause why a writ of mandamus should not issue to the United States District Court for the District of New Jersey and Honorable John Rellstab, Judge of said Court, and thereby refused to interfere with the order of the District Court setting aside the verdict and judgment rendered thereon in the District Court in favor of the petitioner on June 21, 1923, and granting a new trial in said cause.

The grounds on which the jurisdiction of this Court is invoked are that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decisions of this Court and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

Statement of the Case.

On December 9, 1920, David Ginsberg, individually, and as next friend of Harry Ginsberg, and as Administrator *ad prosequendum* of the Estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey against The Delaware, Lackawanna and Western Railroad Company to recover damages for personal injuries alleged to have been sustained by David and Harry Ginsberg, and the pecuniary loss alleged to have been suffered on account of the death of George Ginsberg. Such damages and such pecuniary loss were alleged to have resulted from the negligence of the railroad company in propelling a locomotive against the Ginsbergs while they in an automobile were passing over the tracks of the railroad at a highway crossing.

On account of the diversity of citizenship of the parties, the case was removed from the State Court to the United States District Court for the District of New Jersey, where issue was subsequently joined and the case duly noticed for trial.

The trial of the cause, completed on December 2, 1920, at the September term of the District Court, resulted in a verdict in favor of all the plaintiffs. On motion of defendant the verdict was set aside by the trial Court and a new trial granted to the railroad company on proof of subornation of perjury by plaintiff, David Ginsberg, in procuring the false testimony of two of his witnesses at the trial, named Addie Ridner and William Ridner, respectively.

Subsequently said cause was again tried, and on March 3, 1923, at the January Term of the District Court, the jury rendered a verdict for the defendant Railroad Company, a new trial in which matter was denied by the trial judge, who is one of the respondents in this proceeding, and a rule for final judgment with costs was entered in the District Court on June 21, 1923 (R. p. 31).

The plaintiff, David Ginsberg, subsequently took a writ of error to the Circuit Court of Appeals for the Third Circuit.

On March 21, 1924, the mandate of that Court, affirming the judgment of the District Court in favor of the petitioner Railroad Company, was filed in the District Court (R. p. 31).

At no time during the term at which the judgment final in favor of the petitioner Railroad Company was rendered in the District Court was there any order of the said District Court extending said term, nor did the respective parties to said action stipulate or file any stipulations in the District Court extending the term in which said judgment final was rendered; neither did the District Court, after the mandate of the Circuit Court of Appeals for the Third Circuit was filed on March 21, 1924, extend said term, nor did the attorneys for the respective parties, by stipulation, extend the term in which the mandate from the Circuit Court of Appeals for the Third Circuit was filed, with the District Court, and the term in which the mandate from the Circuit Court of Appeals for the Third Circuit came down and was entered in the District Court likewise expired without an extension of said term (R. p. 31).

On the second trial of the cause, which resulted in a verdict for the petitioner Railroad Company, the petitioner, instead of the Ginsbergs, produced the witnesses Ridner and, although the plaintiffs and their attorneys were well aware of the fact that the said Ridners had given false testimony on the first trial, when they appeared as witnesses for the plaintiffs, which was contradictory to the testimony given by said witnesses on behalf of the petitioner on the second trial of said cause, neither the plaintiffs nor their attorneys sought to impeach the veracity or credibility of said witnesses on the second trial, although opportunity so to do was accorded them.

On March 30, 1925, more than one year after the mandate of the Circuit Court of Appeals was entered in the District Court the plaintiff Ginsberg sought to impeach the verdict in favor of the petitioner by filing with the Clerk of the District Court two affidavits, one by the witness, William Ridner, purporting to show that said witness testified on the second trial of said cause falsely for the petitioner, and another affidavit by Ridner's son, Seth, in which he endeavored to show that the accident to the plaintiff was caused in a manner to fix liability upon the Railroad Company.

After taking testimony in open court before the respondent, the Honorable John Rellstab, the Court granted to Ginsberg a new trial, to the prejudice of the petitioner Railroad Company.

Exhibit "A" in the transcript of the record of the Circuit Court of Appeals for the Third Circuit accompanying the petition (R. p. 1), is the docket entries of the District Court concerning the case involved. An examination of it shows that the terms of said Court in which said cause was pending were never extended after final judgment was rendered on June 21, 1923, nor during the term in which the mandate of the Circuit Court of Appeals for the Third Circuit, affirming the judgment in favor of the petitioner Railroad Company was filed in the District Court, these facts being undisputed.

On July 13, 1925, the Circuit Court of Appeals for the Third Circuit allowed the petitioner a rule to show cause why a mandamus should not issue to the respondents, the United States District Court for the District of New Jersey and the Honorable John Rellstab, Judge of said District Court, directing the respondents to reinstate the judgment so set aside.

Argument was had on said rule to show cause in the Circuit Court of Appeals for the Third Circuit on December 4, 1925, and on September 25, 1926, the Court filed its opinion (R. p. 45), dismissing and discharging the petitioner Railroad Company's application for a mandamus on the ground it had no power to issue said writ, although it was undisputed and was so found by the Circuit Court of Appeals that at the time the District Court set aside said judgment the respondent, the Honorable John Rellstab, assumed to act in the premises at a time after the expiration of the Term in which final judgment had been rendered, which Term had in no way or manner been extended (R. p. 47).

On December 6, 1926, petitioner presented its petition to this Court for a writ of certiorari to review said decision and order of the Circuit Court of Appeals. At the same time petitioner applied to this Court for leave to file a petition for a writ of mandamus directed to the United States District Court for the District of New Jersey and Honorable John Rellstab, Judge of said Court, commanding them to set aside the order of May 9, 1925.

On December 13, 1926, this Court granted said petition for writ of certiorari (R. p. 52), and at the same time denied the petitioner's application for leave to file a petition for mandamus.

Points Upon which Petitioner Intends to Reply.

Petitioner urges that the Circuit Court of Appeals erred in refusing to consider the merits of the cause, and in affirming the order of the court below; in effect dismissing the petitioner's application to it for a writ of mandamus directed to the District Court and to the Judge thereof, upon the sole ground that it had no power to issue the writ, and that said action was erroneous because:

(I) The District Court and its presiding Judge had no authority or power to set aside the final judgment entered upon the verdict in favor of the petitioner more than four terms after said final judgment was entered, no order having been made by the District Court or any of its Judges extending the term in which said final judgment was entered and no stipulations entered into or filed by the respective parties to the litigation, extending the term in which said final judgment was rendered;

(II) Mandamus was the appropriate remedy to correct the action of the District Court and its presiding Judge in exceeding their power and authority;

(III) The Circuit Court of Appeals had appellate jurisdiction to issue a mandamus to the District Court, because the lower Court's action was an interference with its mandate.

POINT I.

The District Court and its presiding Judge had no authority or power to set aside the final judgment entered upon the verdict in favor of the petitioner more than four terms after said final judgment was entered, no order having been made by the District Court or any of its Judges extending the term in which said final judgment was entered and no stipulations entered into or filed by the respective parties to the litigation, extending the term in which said final judgment was rendered.

Proof is presented by the petition (R. p. 1, *et seq.*, R. p. 3) that the term at which the judgment final in favor of the petitioner was entered on June 21, 1923, had expired, and that it was not continued or extended by any order of the Court or stipulation between the parties, and that the action of the respondent Judge in setting aside said judgment final in favor of petitioner by his order of April 28, 1925 (R. p. 32) was at least four terms after the expiration of the term in which said final judgment was entered.

The Circuit Court of Appeals found that the terms of court were not extended (R. p. 47).

That the action of the respondent Judge was in excess of his authority, and that the District Court had no longer any jurisdiction of the cause, is settled beyond question by the decisions of your Honorable Court from the case of *Cameron* v. *McRoberts* (3 Wheaton, 591), where this Court, in its certificate to the Circuit Court for the District of Kentucky, advised the lower Court in this language (p. 593):

> "That in this case the court had not the power over its decree so as to set the same aside on motion after the expiration of the term in which it was rendered,"

down through a long line of decisions to the present day. The opinion of Mr. Justice Miller in *Bronson* v. *Schulten* (104 U. S. 410) sets forth the law so fully as to warrant quotation (p. 415):

> "In this country, all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record and they may then be set aside, vacated, modified or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them, and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered and this is placed upon the ground that the case has passed beyond the control of the court."

Particularly applicable is the case of *Phillips* v. *Negley* (117 U. S. 665). The question involved in that case was the authority of the Supreme Court of the District of Columbia to set aside a verdict and judgment and grant a new trial at a term subsequent to that in which the judgment was entered, but which term had not been extended by any order of the Court or otherwise. In that case, quoting from

Bronson v. *Schulten* (*supra*), Mr. Justice Matthews said (p. 674):

> "'The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered and this authority can neither be conferred upon, nor withheld from, the courts of the United States by the statutes of a state or the practice of its courts.'"

Continuing, the Court said (p. 674):

> "Although the opinion also shows that upon the facts of that case, the action of the Circuit Court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision of the case rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error—or for the purpose of correctiag the record according to the fact where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision without recapitulating previous cases in this court, in which the point has been noticed, for the purpose of showing their harmony. It is the uniform doctrine of this court. 'No principle is better settled,' it was said in *Sibbald* v. *United States*, 12 Pet. 488, 492, 'or of more universal application than that no court can reverse or annul its final decrees or judgments for errors of fact or law after the term in which they have been rendered, unless for clerical mistakes. *Cameron* v. *McRoberts*, 3 Wheaton, 591; *Bank of Kentucky* v. *Wistar*, 3 Pet. 431, or to reinstate a cause dismissed by mistake, *The Palmyra*, 12 Wheaton, 1, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing.'"

Concluding, the learned Justice said (p. 679):

> "We are therefore of the opinion that the Supreme Court of the District, both at special and general term, in entertaining and granting the motion to set aside the judgment in the present case committed error, * * *"

So settled appears the law laid down in *Bronson* v. *Schulten* (*supra*) that this Court, speaking through Mr. Justice Hughes in *In re Metropolitan Trust Company* (218 U. S. 312), referred to the cases hereinbefore cited, as follows (p. 320):

> "It is in this light that the subsequent proceedings in the Circuit Court must be examined. If that court had jurisdiction to vacate the decree of January 10, 1908, in favor of the Trust Company, it was by virtue of its own control over the decree and not by force of the mandate of the Appellate Court. Nor could the court exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered, for in this case, the term had ended before the motion was made. *Cameron* v. *M'Roberts*, 3 Wheaton, 591; *Sibbald* v. *U. S.*, 12 Pet. 488; *Bronson* v. *Schulten*, 104 U. S. 410-15; *Ayres* v. *Wiswal*, 112 U. S. 187-90; *Phillips* v. *Negley*, 117 U. S. 665, 674."

See also

> 11 *Rose's Notes*, U. S. Reports, 551, *et seq.*;
> *Wetmore* v. *Karrick*, 205 U. S. 141.

It undoubtedly will be insisted by counsel for the defendant that the District Court had an inherent power to vacate the judgment rendered in favor of the petitioner and set aside the verdict upon which the judgment was rendered, even after the term had expired, because the claimed fraud in the judgment vacated rested upon the perjured testimony of one of the witnesses for the prevailing party. But we find that the great weight of authority is against this contention and that the acts for which a court will, on account of fraud, annul a judgment between the same parties after the term is ended have relation to frauds extrinsic or collateral to the matter tried and not to a fraud in the matter upon which the judgment was rendered.

This precise doctrine was established in the case of *United States* v. *Throckmorton*, 98 U. S. 61, where after a review

of the authorities Mr. Justice Miller used this language (p. 68):

> "That the mischief of retrying every case in which a judgment or decree rendered on false testimony given by perjured witnesses or on contracts or documents whose genuineness or validity was in issue and which are afterwards ascertained to be forged or fraudulent would be greater by reason of the endless nature of the strife than any compensation arising from doing justice in individual cases."

Chief Justice Waite, in *Vance* v. *Burbank*, 101 U. S. 514, referring to the *Throckmorton* case (*supra*), said that the fraud in respect to which relief will be granted, where a judgment is sought to be set aside after the decision of a judicial tribunal, must be such as has been practiced upon the unsuccessful party and prevented him from exhibiting his case fully and that false testimony is not enough if the disputed matter has been actually presented to or considered by the appropriate tribunal as the record shows was done in the instant case (R. p. 4).

The well considered case of *Nelson* v. *Meehan*, 155 Fed. 1, marshals the opinions of this Court and the lower Federal tribunals. We venture a quotation from it (p. 11):

> "So if it is a fact that the term of court at which the decree was rendered had expired before the motion to vacate was filed, then the case is but one where the litigants have had their day in court and have been afforded full opportunity to try the merits of their controversy. They had had a fair trial. The defendants lost. They were given the right of appeal and availed themselves of it. Again they were unsuccessful and no fraud extrinsic or collateral to the matter tried being shown and no statutory ground for vacating the decree appearing, it will not do for them now to seek to retry the issues already passed upon. The litigation should end."

POINT II.

Mandamus was the appropriate remedy to correct the action of the District Court and its presiding Judge in exceeding their power and authority.

The remedial appropriateness of the writ of mandamus is conclusively established by the adjudicated cases, since Chief Justice Marshall, speaking for this Court, in *Ex Parte Crane* (5 Peters, 190), laid down the rule that the writ was one of the prerogative writs of this Court (p. 193):

> "The Judicial Act, sec. 13, enacts that the Supreme Court shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding offices under the authority of the United States."

This Court in *McClelland* vs. *Carland* (217 U. S. 268), said (p. 279):

> "Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in Section 716 of the Revised Statutes of the United States. This section we have already had occasion to quote, and when read in connection with Section 12 of the Court of Appeals Act, it gives to the Circuit Court of Appeals the authority, as this Court has, to issue writs of *scire facias* and all writs not specifically provided for by statute and necessary for the exercise of the Court's jurisdiction and agreeable to the usages and principles of law."

Section 12 of the Court of Appeals Act referred to in the *McClelland* case has been perpetuated in U. S. Code, Title 28, Chapter 10, Section 377 (former Judicial Code, Section 262). See *U. S.* vs. *Mayer*, 235 U. S., 55.

It has been long settled that mandamus is the appropriate remedy—a power conferred in virtue of the general superintendence of inferior federal tribunals. While it is conceded that a motion for a new trial rests in the discretion of the Judge of the inferior court, and that this Court will not control the exercise thereof, yet where he has no authority to act on the application, or has acted contrary to his authority, mandamus is the proper remedy.

> *Life and Fire Insurance Co. v. Wilson*, 8 Peters 291, at p. 293;
> *Ex Parte Bradley*, Wall. 364, 368;
> *In re Pollitz*, 206 U. S. 323, 331;
> *Ex Parte Nebraska*, 209 U. S. 436, 442.

In re Winn, 213 U. S. 458, Mr. Justice Moody, speaking for the Court, said (p. 468):

> "* * * where the record makes it clear as a matter of law that this Circuit * * *" [*sic* District] "Court was without jurisdiction to take any action whatever * * * the writ of mandamus lies."

This was reiterated in *In re Metropolitan Trust Co.*, 218 U. S. 312, where Mr. Justice Hughes said (p. 321):

> "The question is not with respect to the mere form of the application which was made to the Circuit" [*sic* District] "Court for the purpose of setting the decree aside. When the motion was made the Court was without jurisdiction to vacate the decree. As the Court in granting the motion exceeded its power, mandamus is the appropriate remedy."

POINT III.

The Circuit Court of Appeals had appellate jurisdiction to issue a mandamus to the District Court, because the lower Court's action was an interference with its mandate.

The Circuit Court of Appeals denied the petitioner Railroad Company's application for the mandamus because of its conclusion that it had no power to issue the writ, it saying (R. p 48):

> "When the judgment was set aside, nothing was pending in this Court or the District Court. The Term in which the final judgment had been entered in the District Court, as above stated, had long since expired without any extension of any kind. If we dismiss the order, the case may possibly reach this Court again, but if the judgment is reinstated, the judgment will remain final in that Court and will never come into this Court. The reinstatement of the judgment, therefore, can not be in aid of the jurisdiction of this Court. Accordingly, we have no power to issue the writ."

From the reasoning of the Circuit Court of Appeals, it appears that it lost sight of the fact that the judgment which the District Court disturbed was its own judgment, and not that primarily of the Court below, because the Circuit Court of Appeals affirmed the judgment in favor of the petitioner, their decision thereon being reported in 296 Federal Reporter, 439, and thereafter issued its mandate that its said judgment be carried out, which mandate was filed in the District Court on March 21, 1924 (R. p. 11).

Southard et al v. *Russell* (16 Howard, 547) is authority for the contention that such was the status of the judgment entered in the District Court. There this Court said (p. 570):

> "* * * the decree sought to be set aside by this bill of review in the Court below was entered in pursuance of an

appeal in the original suit. It is, therefore, the decree of this Court, and not that primarily entered by the Court below, that is sought to be interfered with."

Any interference by the District Court with the judgment of the Circuit Court of Appeals, either by way of rule to show cause for the granting of a new trial, rehearing or review, was only permissible after the proper application had been made to and allowed by the Circuit Court of Appeals, for, your Honorable Court has said, *In re Potts* (166 U. S. 263, at pp. 265-6):

> "The general rules which govern cases of this kind are stated and the decisions by which those rules have been established are collected in the recent case of *Sanford Fork and Tool Company*, petitioner, 160 U. S. 247, in which this Court said:
>
> 'When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the decree as well as the law of the case and must carry it into execution according to the mandate. That court can not vary it or examine it for any other proofs for execution or give any other or further relief or review it, even for apparent error in matter decided upon appeal or intermeddle with it, other than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues a decree of this Court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal, if involving a sufficient amount, or by a writ of mandamus to execute the mandate of this Court; but the Circuit Court may consider and decide any matters left open by the mandate of this Court and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this Court at the time of rendering this decree may be consulted to ascertain what was intended by its mandate, and, either upon an application for a writ of mandamus or upon a new appeal, it is for this Court to construe its own mandate and act accordingly.'"
>
> * * * * * *

"When the merits of a case have been once decided by this Court upon appeal, the Circuit Court has no authority, without express leave of this Court, to grant a new trial, a rehearing or a review, or to permit new defenses or the merits to be introduced to unsettle any of the answer * * * * In this respect a motion for a new trial or petition for a rehearing stands upon the same ground as a bill of review * * * * (p. 367)

See also case further cited by this Court in Whitford vs. Clarke (212 U. S. 284, p. 290).

"It is further objected that the Circuit Court of Appeals had no jurisdiction to issue the writ of mandamus as that writ can only be issued in aid of the appellate jurisdiction of the Circuit Court of Appeals, and it is contended, as that Court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed.

"Section 22 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in Section 716 of the Revised Statutes of the United States. This section we have already had occasion to quote, and when read in connection with Section 22 of the Court of Appeals Act, it gives to the Circuit Court of Appeals the authority, in this Court has, to issue writs of error before and at which are specifically provided for by statute and necessary for the exercise of the Court's jurisdiction and agreeable to the usages and principles of law.

"In this case it appears that the original action was brought in the Circuit Court of the United States (might have been taken on appeal to the Circuit Court of Appeals) the case involved over two thousand dollars in amount and was between citizens of different states. There are two existing decisions of the District Courts holding different views as to the right to have writ of error in any case involved in this case before the Appellate Court has actually obtained jurisdiction of the case. There are expressions in opinions of this Court to the effect that such writs issue in aid of a jurisdiction actually acquired, but we think the true rule that where a case is within the appellate jurisdiction of the higher

by the Circuit Court of Appeals in refusing to issue the writ of mandamus and in dismissing petitioner's application therefor.

It is further respectfully submitted that, for the reasons stated, the order of the Circuit Court of Appeals, Third Circuit, should be reversed and that the said Court should be instructed to issue a mandamus directing respondents to reinstate the judgment of the District Court entered in favor of petitioners on June 21, 1923.

FREDERIC B. SCOTT,
Counsel for Petitioner.

No. 141

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1926.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY,

Petitioner,

vs.

JOHN BRELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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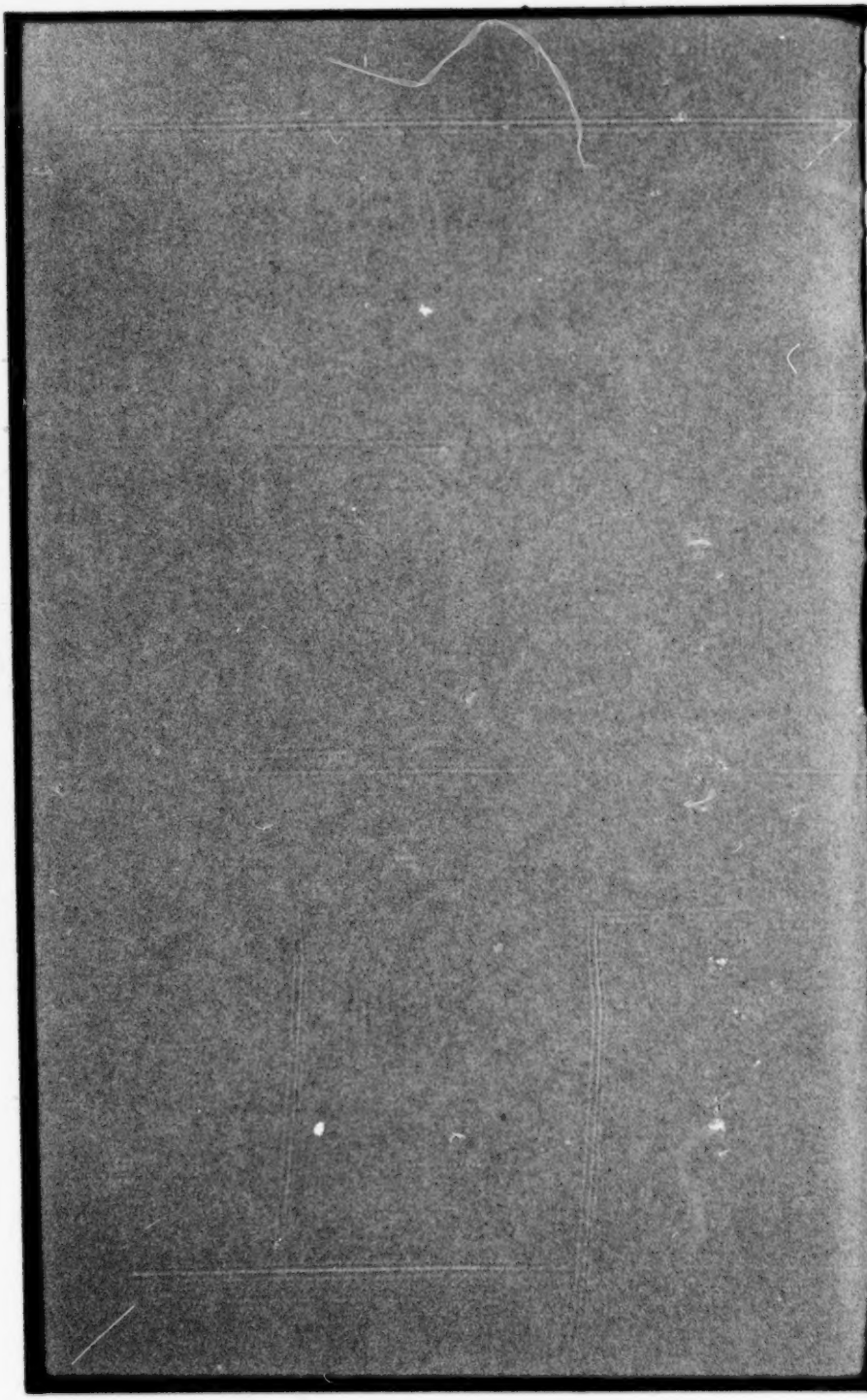

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Petitioner*, vs. JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, *Respondents*.	*On Petition for Writ of Certiorari.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARRY KALISCH,
Counsel for Respondent.

STATEMENT OF THE CASE.

On December 9, 1920, one David Ginsberg individually and as next friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg deceased, brought an action at law in the Supreme Court of the State of New Jersey for personal injuries and damages which the said David Ginsberg and Harry Ginsberg were alleged to have suffered, and for the pecuniary loss suffered on account of the death of George Ginsberg for the alleged negligent acts of the agents and servants of the D. L. & W. Railroad Company in running into and

upon said parties a locomotive operated by the agents of the railroad company while said parties were endeavoring to pass over a railroad grade crossing in an automobile.

On account of the diversity of citizenship of the parties, the case was removed from the State court to the United States District Court for the District of New Jersey where issue was subsequently joined and the case duly noticed for trial.

On December 2, 1921, at the September term of the District Court, this cause was tried and resulted in a verdict for all the plaintiffs in said action, which verdict was subsequently set aside by the Trial Court and a new trial granted to the Railroad Company because of the alleged subornation of perjury by the plaintiff, David Ginsberg, of two of his witnesses by the name of Addie and William Ridner.

The only evidence of the alleged subornation of perjury was a confession by the two alleged perjured witnesses. These two witnesses, however, subsequently recanted and in an affidavit which one of them, William Ridner, made on January 12, 1925, he stated that at no time did Mr. Ginsberg ever suggest that he or his wife, Addie Ridner, testify to anything but the truth, and further that at no time did Mr. Ginsberg ever offer anything to him or his wife. This affidavit is Exhibit D, page 17, of the petitioner's petition and will be found on page 21 of petitioner's petition.

On the 1st and 2nd of March, 1923, said cause was again tried before a jury in the United States District Court, District of New Jersey, at Trenton, N. J. At said trial the two witnesses, William Ridner and Addie M. J. Ridner, were sworn and testified in behalf of the Delaware, Lackawanna and Western Railroad Co., instead of for the plaintiffs.

Said William Ridner testified at the second trial that the accident, which is the subject of this suit, occurred late in the evening between six and seven o'clock, and that he, the said William Ridner, had occasion to notice a train come up from Dover toward Chester, and that at that time he was about fifty or sixty feet from the bridge or the tow-path, and that he recollected that the said train blew a whistle and rang a bell, and the said Addie M. J. Ridner testified that on the day of the accident she was in the vicinity of the railroad crossing with her husband and that they had been out for a walk and were on their way home; that they were walking on the tow-path and that she saw a train coming up from Dover toward Chester, and that it was real late in the evening; that she noticed that the train gave bell and whistle signals and that she heard the whistle blow a couple of times, but that the bell rang until it, the train, had passed on over from where they were standing.

The jury in said cause after being unable to agree for some time and remaining out over night returned for further instructions after which they again retired and shortly thereafter brought in a verdict in favor of the defendant, Delaware, Lackawanna & Western R. R. Co.

Exceptions were taken to the additional instructions of the Court and an appeal was taken by the plaintiff, to the United States Circuit Court of Appeals based on those exceptions. No other questions were raised or argued. The appeal was argued at the October Term, 1923, and the mandate of the Circuit Court of Appeals affirming the judgment was entered March, 1924. The opinion is reported in 296 Federal, p. 439.

In the month of March, 1923, plaintiffs' counsel employed one Charles Whitnall, a detective, to make an investigation concerning the two witnesses, William Ridner and Addie Ridner; this was before the appeal to the United States Circuit Court of Appeals had been taken.

The investigation disclosed nothing of importance and on April 15, 1924, plaintiffs' counsel employed David Jacobsen to make a further investigation and said Jacobsen, as a result of said investigation, obtained a statement from one, William C. Smith, and May Bailey. After obtaining said statement said Jacobsen continued his investigation and on January 12 and 13, 1925, succeeded in obtaining from said William Ridner, who was the witness sworn in behalf of the defendant in the last trial, and Ridner's son Seth, affidavits showing that neither William Ridner or his wife Addie Ridner witnessed the accident at all and were at their home when it occurred; these affidavits are Exhibits "C" and "D" in defendant's petition for a mandamus.

The plaintiff, David Ginsberg, is a man in poor circumstances, having been rendered so as a result of this litigation, and has been unable to pay out large sums of money in the constant employment of detectives, but has, however, himself personally made inquiries and investigations concerning the witnesses, William Ridner and Addie M. J. Ridner, which investigation has extended over a long period of time since the rendition of the verdict as above stated.

That upon the presentation of the foregoing facts together with the sworn statements of said William Ridner and Seth Ridner referred to above and upon due notice given to defendant, Judge Rellstab on the 28th day of April, 1925, allowed a rule to show cause why the verdict and judgment entered in said cause should not be set aside and a new trial granted. Upon said application defendant submitted two affidavits touching upon the substantial merits of the application and nothing was then said upon the question of jurisdiction; and in allowing said rule Judge Rellstab directed me to submit a copy of the order to defendant for his approval, which I did and defendant after making some minor changes in the

order, concerning the taking of testimony under the order, returned the same to me and Judge Rellstab signed it after he also had made some trivial alterations.

The order to show cause was returnable May 5, 1925, and on that day both parties appeared by their counsel; the witnesses, William Ridner and Addie Ridner, appearing under subpoena; it being the expressed desire of Judge Rellstab to hear both these witnesses in open court. When the matter was opened no objection was made by the defendant to the jurisdiction of the court nor does the transcript or record show such objection until the very end of the proceedings when Judge Rellstab announced his determination to make the rule absolute; the entire matter was heard on its merits; the star witness being William Ridner; the defendant examining witnesses as well as the plaintiff, as will appear from the transcript.

At the close of this witness' testimony the Court called both counsel and announced his determination to make the rule absolute, whereupon defendant's counsel *then* raised the question of lack of jurisdiction, and the Court formally disposed of the matter as follows:

> The Court: As the matter stands before me, this application for setting aside of the verdict is founded upon conditions that were not brought to the attention of the plaintiff, until, after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late.
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> However, if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire.
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> It seems to me that without going into further testimony, there is enough disclosed by Ridner's testimony, to require the Court to make the rule absolute.

The claim of the petitioner is that the judgment and verdict were set aside more than four terms after the judgment was entered without having had the term at

which the judgment was entered, extended, and that the judgment for the defendant, Delaware Lackawanna & Western Railroad, having been appealed to the Circuit Court of Appeals and affirmed by that Court and its mandate sent down, the United States District Court could not interfere with the judgment but was required to carry out the mandate of the Circuit Court of Appeals.

ARGUMENT ON BEHALF OF RESPONDENTS.

Circuit Court of Appeals had no authority in this case to issue a writ of mandamus.

The rule is firmly established that the writ of mandamus cannot be used as a writ of error. This has been repeatedly held. The case of *Ex parte Loring*, 94 U. S. Supreme Court, (4 Otto), page 165, presents the identical question raised in the case at bar. The opinion is by Waite, *C. J.*, and the facts briefly were as follows:

The plaintiff in the action after his case was in, took a non-suit, and a judgment to that effect was entered at June term, 1874. In October, 1876, at subsequent term of court plaintiff on notice to defendant moved to vacate judgment of non-suit and restore the cause to the docket for trial. This motion was granted October 31st, and later in the term defendant moved to vacate the order of October 31st, which motion was denied; the petition by defendant, for mandamus is to require the Court below to vacate the order setting aside said non-suit. Waite, *C. J.*, said in his opinion in that case:

> "It seems clear to us that the object in this case is to use the writ of mandamus as a writ of error. This cannot be done. We may require the Circuit Court in a proper case, if it refuses, to act but cannot control its decisions. Here the court has acted and given its decision upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a

> writ of error after a final judgment has been rendered. The writ of mandamus has no such office to perform. Petition denied."

Another case in point is *Ex Parte Railway Co.*, 103 U. S. Supreme Court, page 794. In that case the motion was for a rule to show cause why a peremptory mandamus should not issue to the Circuit Court commanding it to set aside its orders dismissing the suit and dissolving the attachment, etc. The ground for dismissing the suit and dissolving the attachment was jurisdictional. I quote from the opinion, page 795,

> "that afterwards said motion for such order coming on for hearing, said Alley entering a special plea to the jurisdiction, the gravamen thereof being that he was not an inhabitant of said district, etc., that the court sustained the plea and adjudged that the suit be dismissed and the attachment dissolved."

Waite, *C. J.*, delivered the opinion of the court saying:

> "This motion is denied, first because it is an attempt to use the writ of mandamus as a writ of error to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit."

The Court did not even allow a rule to show cause. See also *Ex Parte Hoard*, 105 U. S. Supreme Court, page 578, October term, 1881. The opinion in that case cites with approval the Loring case *supra* and on page 580 says:

> "It is an elementary principle that a mandamus cannot be used to perform the office of an *appeal or a writ of error.*"

In *Amer. Const. Co.* v. *Jacksonville Co.*, 148 U. S. Supreme Court, page 379, the Court said the following upon the subject of mandamus:

> "It does not therefore lie to review a final judgment or decree of the Circuit Court sustaining a plea to the jurisdiction even if no appeal or writ of error is given by law. Least of all can a writ

> of mandamus be granted to review a ruling or interlocutory order in the progress of a cause."

See also *Corpus Juris*, Vol. 25, page 860.

Counsel for petitioner takes the position that the Circuit Court of Appeals has *unqualified* authority to issue a writ of mandamus.

He offers in support of his contention one case *McClellan* v. *Carlin*, 217 U. S. Rep., page 268. He quotes just enough of it to give a false impression of what that case decided. That case did not depart in the slightest from the principle approved in the above-mentioned cases that mandamus will issue *only* in aid of the appellate jurisdiction. It did go so far as to say that in aiding the appellate jurisdiction, the Circuit Court of Appeals need not await the arrival of the case there, but can mandamus the Court below to proceed to final judgment where the Court below has refused to do so, so that the aggrieved party may have his appeal from the judgment to the Circuit Court of Appeals if desired; in this way the suitor's right of appeal to the Circuit Court of Appeals is aided and protected by the mandamus, but the writ of mandamus is not the appeal itself and can never be used as such.

A cursory reading of *McClellan* v. *Carlin* (*supra*), the case relied upon by petitioner, will demonstrate the correctness of the foregoing view.

It was a suit commenced against Geo. T. Blackman, administrator of the Estate of John C. McClellan, deceased, and others in the Circuit Court of the United States for the District of South Dakota in which suit complainants were citizens of states other than South Dakota and the defendant, Blackman, was a citizen of South Dakota. The bill set up that complainants were the sole surviving heirs at law and next of kin of John C. McClellan who died intestate; that defendant Blackman, administrator, etc., had

in his possession assets of about $35,000; consisting of real and personal property, that there were no unsatisfied claims and that the estate was ready for distribution according to the laws of South Dakota; the bill prayed that the complainants might be adjudicated the sole heirs at law and next of kin of said decedent and entitled to inherit the estate, and that Blackman render a just and true account of the property in his hands. Defendant, Blackman, answered by admitting certain allegations and denying others and stating that he held the property subject to the order of the Court. At this juncture the State of Dakota by its attorney general asked leave to intervene in the case, claiming that decedent died without legal heirs and that there was an escheat of the estate. The Court refused to permit the State of Dakota to intervene but ordered that a further prosecution of the action then pending before it be stayed for the period of ninety days for the purpose of allowing the State of Dakota to commence a proper action to establish its title and interest in and to the estate of the decedent and until the determination of such action brought by the State of Dakota. Complainants filed an application for the vacation of the orders staying the prosecution of their suit until the determination of the suit by the State of Dakota in the State Court, but the same was denied, and thereafter the petition for mandamus in the Circuit Court of Appeals was filed and the writ denied whereupon the U. S. Supreme Court granted the writ of certiorari to review the action of the Court of Appeals.

The Court in its opinion on page 280 recognized that there were different views as to the right to issue such writs (mandamus) before the appellate court has actually obtained jurisdiction of the case, and on that same page says:

> "There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction *actually acquired*."

and then the opinion goes on to say:

> "But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the Court below."

And the Court on page 281 (bottom of page), and 282 says:

> "It cannot be denied that a Circuit Court of the United States like other Courts had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the State Court by its action in a case involving all the parties might render a judgment which would be *res judicata* and thus prevent further proceedings in the Federal Court."

And at the bottom of page 280 the Court in that case says:

> "Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the State Court, might prevent the adjudication of the questions involved and thereby prevent a review thereof in the Circuit Court of Appeals which had jurisdiction for that purpose we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it."

The purpose then in granting the writ of mandamus in that case was to compel the Federal Court below to proceed with the action so that the Circuit Court could exercise its right of review on appeal. Thus it was in direct line with all the cases; it was a mandamus in aid of the appellate jurisdiction of the Circuit Court of Appeals. That case therefore instead of supporting petitioner's view is in direct opposition to it.

It is respectfully submitted that the writ of certiorari be denied with costs.

Isidor [redacted] KALISCH,
Attorney for Respondent.

JAN 3 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Petitioner,

against

HONORABLE JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,
Respondents.

October Term, 1927.

No. 141.

BRIEF FOR RESPONDENTS.

HARRY KALISCH,
Counsel for Respondents,

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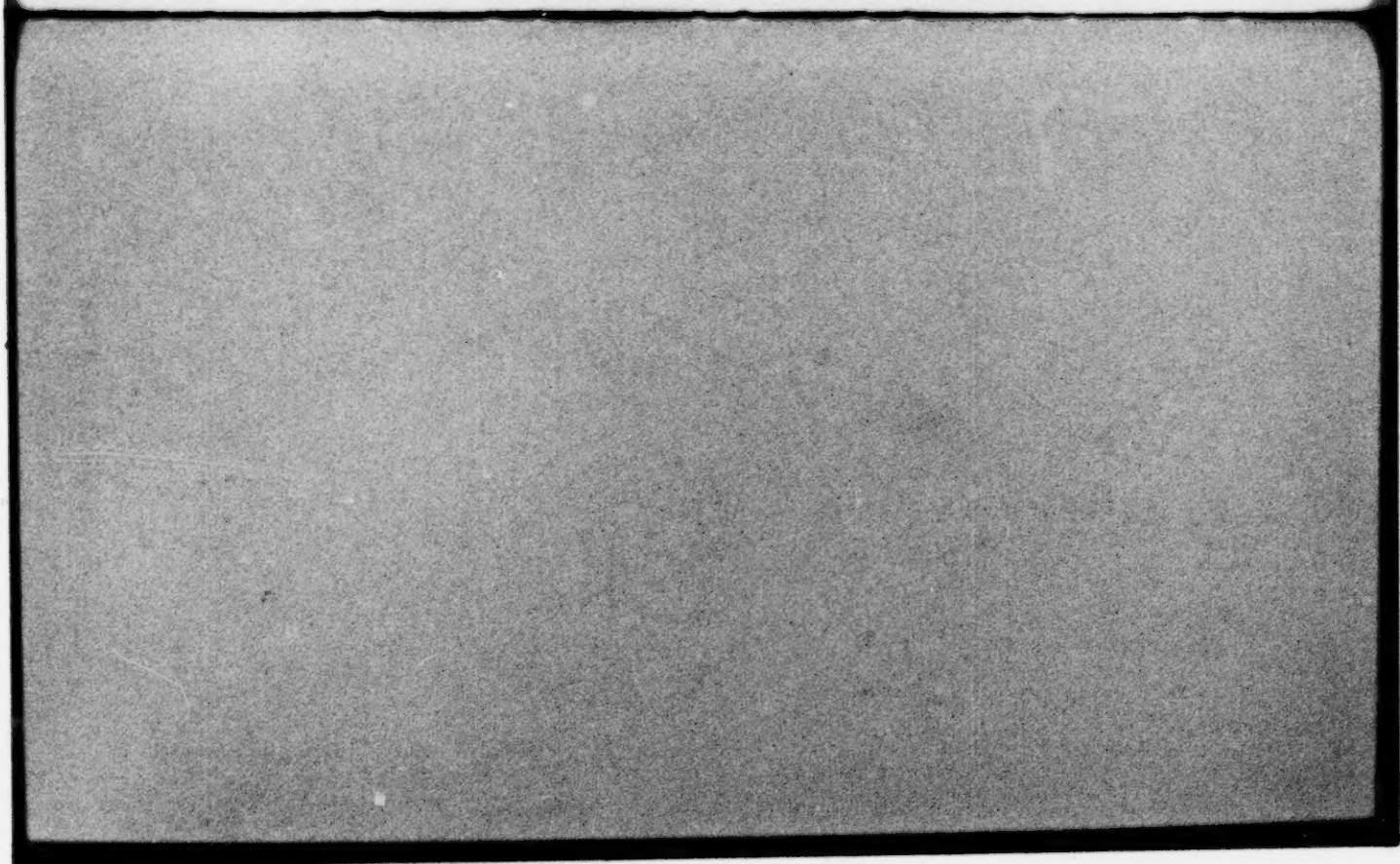

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Supreme Court of the United States

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Petitioner,* *against* HONORABLE JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, *Respondents.*	October Term, 1927. No. 141.

BRIEF FOR RESPONDENTS.

This case comes before the Court upon writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, granted December 13, 1926.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 15 Fed. (2d), 137.

The District Court rendered no written opinion but announced verbally its decision in open court as follows:

> The Court: As the matter stands before me, this application for setting aside of the verdict is founded upon conditions that were not brought to the attention of the plaintiff until after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late.
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> However, if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire.
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> It seems to me that without going into further testimony, there is enough disclosed by Ridner's testi-

mony, to require the Court to make the rule absolute."

See pp. 38-39 transcript.

The order to be reviewed is dated September 25, 1926 (R., p. 50). It dismissed and discharged a rule to show cause why a writ of mandamus should not issue to the United States District Court for the District of New Jersey and Honorable John Rellstab, Judge of said Court, and thereby refused to interfere with the order of the District Court setting aside the verdict and judgment rendered thereon in the District Court in favor of the petitioner on June 21, 1923, and granting a new trial in said cause.

The grounds on which the jurisdiction of *this* Court is invoked are that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decision of this Court and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. These grounds are without foundation, as this Court has frequently decided that the writ of mandamus should not issue in cases identical with the case *sub jud.* See *Ex parte* Loring, 94 U. S. Supreme Court, p. 165, and other cases cited herein.

Statement of the Case.

On December 9, 1920, one David Ginsberg individually and as next friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey for personal injuries and damages which the said David Ginsberg and Harry Ginsberg were alleged to have suffered, and for the pecuniary loss suffered on account of the death of George Ginsberg for the alleged negligent acts of the agents and servants of the railroad company in running into and upon said parties a

locomotive operated by the agents of the railroad company while said parties were endeavoring to pass over a railroad grade crossing in an automobile.

On account of the diversity of citizenship of the parties, the case was removed from the State court to the United States District Court for the District of New Jersey where issue was subsequently joined and the case duly noticed for trial.

On December 2, 1921, at the September term of the District Court, this cause was tried and resulted in a verdict for all the plaintiffs in said action, which verdict was subsequently set aside by the Trial Court and a new trial granted to the Railroad Company because of the alleged subornation of perjury by the plaintiff, David Ginsberg, of two of his witnesses by the name of Addie and William Ridner.

The only evidence of the alleged subornation of perjury was a confession by the two alleged perjured witnesses. These two witnesses, however, subsequently recanted and in an affidavit which one of them, William Ridner, made on January 12, 1925, he stated that at no time did Mr. Ginsberg ever suggest that he or his wife, Addie Ridner, testify to anything but the truth, and further that at no time did Mr. Ginsberg ever offer anything to him or his wife. This affidavit is Exhibit D, pages 17-21 of the transcript.

On the 1st and 2nd of March, 1923, said cause was again tried before a jury in the United States District Court, District of New Jersey, at Trenton, N. J. At said trial the two witnesses, William Ridner and Addie M. J. Ridner, were sworn and testified in behalf of the Delaware, Lackawanna and Western Railroad Co., instead of for the plaintiffs.

Said William Ridner testified that the accident, which is the subject of this suit, occurred late in the evening be-

tween six and seven o'clock, and that he, the said William Ridner, had occasion to notice a train come up from Dover toward Chester, and that at that time he was about fifty or sixty feet from the bridge or the tow-path, and that he recollected that the said train blew a whistle and rang a bell, and the said Addie M. J. Ridner testified that on the day of the accident she was in the vicinity of the railroad crossing with her husband and that they had been out for a walk and were on their way home; that they were walking on the tow-path and that she saw a train coming up from Dover toward Chester, and that it was real late in the evening; that she noticed that the train gave bell and whistle signals and that she heard the whistle blow a couple of times, but that the bell rang until it, the train, had passed on over from where they were standing.

The jury in said cause after being unable to agree for some time and remaining out over night, returned a verdict in favor of the defendant, Delaware, Lackawanna & Western Railroad Co. An appeal was then taken by the plaintiff based on certain trial exceptions, to the United States Circuit Court of Appeals, which said appeal was argued at the October Term, 1923, and the mandate of the Circuit Court affirming the judgment was entered in March, 1924.

In the month of March, 1923, plaintiffs' counsel employed one Charles Whitnall, a detective, to make an investigation concerning the two witnesses, William Ridner and Addie Ridner; this was before the appeal to the United States Circuit Court of Appeals had been taken. The investigation disclosed nothing of importance and on April 15, 1924, plaintiffs' counsel employed David Jacobsen to make a further investigation and said Jacobsen, as a result of said investigation, obtained a statement from one, William C. Smith, and May Bailey. After obtaining said statement said Jacobsen continued his investigation and on January 12 and 13, 1925, succeeded in obtaining from

said William Ridner, who was the witness sworn in behalf of the defendant in the last trial, and Ridner's son Seth, affidavits showing that neither William Ridner or his wife Addie Ridner witnessed the accident at all and were at their home when it occurred; these affidavits are Exhibits "C" and "D" in the transcript on pages 14-21.

The plaintiff, David Ginsberg, is a man in poor circumstances, having been rendered so as a result of this litigation, and has been unable to pay out large sums of money in the constant employment of detectives, but has, however, himself personally made inquiries and investigations concerning the witnesses, William Ridner and Addie M. J. Ridner, which investigation has extended over a long period of time since the rendition of the verdict as above stated.

That upon the presentation of the foregoing facts together with the sworn statements of said William Ridner and Seth Ridner referred to above, and upon due notice given to defendant, Judge Rellstab on the 28th day of April, 1925, allowed a rule to show cause why the verdict and judgment entered in said cause should not be set aside and a new trial granted. Upon said application defendant submitted two affidavits touching upon the substantial merits of the application and nothing was then said upon the question of jurisdiction; and in allowing said rule Judge Rellstab directed me to submit a copy of the order to defendant for his approval, which I did and defendant after making some minor changes in the order, concerning the taking of testimony under the order, returned the same to me and Judge Rellstab signed it after he also had made some trivial alterations.

The order to show cause was returnable May 5, 1925, and on that day both parties appeared by their counsel; the witnesses, William Ridner and Addie Ridner, appearing under subpoena; it being the expressed desire of Judge

Rellstab to hear both these witnesses in open court. When the matter was opened no objection was made by the defendant to the jurisdiction of the Court nor does the transcript or record show such objection until the very end of the proceedings when Judge Rellstab announced his determination to make the rule absolute; the entire matter was heard on its merits; the star witness being William Ridner; the defendant examining witnesses as well as the plaintiff, as will appear from the transcript.

At the close of this witness' testimony the Court called both counsel and announced his determination to make the rule absolute, whereupon defendant's counsel *then* raised the question of lack of jurisdiction, and the Court formally disposed of the matter as follows:

> The Court: As the matter stands before me, this application for setting aside of the verdict is founded upon conditions that were not brought to the attention of the plaintiff, until, after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late.
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The claim of the petitioner is that the judgment and verdict were set aside more than four terms after the judgment was entered without having had the term at which the judgment was entered, extended.

On July 13, 1925, the Circuit Court of Appeals for the Third Circuit allowed the petitioner a rule to show cause why a mandamus should not issue to the respondents, the United States District Court for the District of New Jersey and the Honorable John Rellstab, Judge of said Dis-

trict Court, directing the respondents to reinstate the judgment so set aside.

Argument was had on said rule to show cause in the Circuit Court of Appeals for the Third Circuit on December 4, 1925, and on September 25, 1926, the Court filed its opinion (R., p. 45), dismissing and discharging the petitioner Railroad Company's application for a mandamus on the ground that it had no power to issue said writ.

ARGUMENT.

POINT I.

Circuit Court of Appeals had no authority in this case to issue a writ of mandamus.

The rule is firmly established that the writ of mandamus cannot be used as a writ of error. This has been repeatedly held. The case of *Ex Parte Loring*, 94 U. S. Supreme Court, (4 Otto), page 165, presents the identical question raised in the case at bar. The opinion is by Waite, *C. J.*, and the facts briefly were as follows:

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> "This motion is denied, first because it is an attempt to use the writ of mandamus as a writ of error to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit."

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A cursory reading of *McClellan* v. *Carlin (supra)*, the case relied upon by petitioner, will demonstrate the correctness of the foregoing view.

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> "There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction *actually acquired*."

and then the opinion goes on to say:

> "But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the Court below."

And the Court on page 281 (bottom of page), and 282 says:

> "It cannot be denied that a Circuit Court of the United States like other Courts had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the state court by its action in a case involving all the parties might render a judgment which would be *res judicata* and thus prevent further proceedings in the Federal Court."

And at the bottom of page 280 the Court in that case says:

> "Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the State Court, might prevent the adjudication of the questions involved and thereby prevent a review thereof in the Circuit Court of Appeals which had jurisdiction for that purpose we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it."

The purpose then in granting the writ of mandamus in that case was to compel the Federal Court below to proceed with the action so that the Circuit Court could exercise its right of review on appeal. Thus it was in direct line with all the cases; it was a mandamus in aid of the appellate jurisdiction of the Circuit Court of Appeals. That case therefore instead of supporting petitioner's view is in direct opposition to it.

Petitioner's brief contains extracts from numerous citations to justify the allowance of the writ of mandamus.

These numerous citations utterly fail to justify the allowance of the writ of mandamus as in none of them was a writ of mandamus allowed. *Bronson* v. *Schulten*, 104 U. S. Supreme Court 410, cited on page 8 of petitioner's brief, and *Wetmore* v. *Karrick*, 205 U. S. Supreme Court 141, on page 11 of petitioner's brief, went to the U. S. Supreme Court by writ of error, not by mandamus.

Nelson v. *Meehan*, 155 Federal Rep., page 1, cited on page 13 of petitioner's brief, went to the United States Circuit Court of Appeals, on appeal, not mandamus. The same jurisdictional question was involved.

In all of petitioner's brief he has not cited one authority to justify the allowance of a writ of mandamus; the cases which he cites support the opposite view, viz; that the jurisdictional question involved in this case can only be reviewed on appeal or writ of error.

See also *Hammond Lumber Co. v. U. S. District Court for District of Oregon, et al.*, 240 Federal Rep., page 924, on page 926; *Muir* v. *Chatfield*, 255 Federal Rep., page 204.

In re Pollitz, 206 U. S. 323, was an application for mandamus to compel the Circuit Court of U. S. for the Southern District of New York to remand to the Supreme Court of New York a cause which the Circuit Court has refused to remand because of the opinion that a separable controversy was presented within its jurisdiction. The application was denied, the Court saying:

> "If the ruling of the Circuit Court was erroneous as is contended but which we do not intimate, it may be reviewed after final decree on appeal or error."

Ex Parte Nebraska, 209 U. S. 436-442, was also an application for mandamus and was denied, the Court saying that the writ could not be used to perform the office of an appeal or writ of error.

The only case cited by petitioner, that touches upon the jurisdiction of the Circuit Court of Appeals to issue the writ of mandamus is *McClellan* v. *Carland (supra)*. All the other cases cited by him had to do with the jurisdiction and power of THIS (U. S. Supreme) Court only.

Whatever may be the power of THIS Court, it is certain that the Circuit Court of Appeals is a statutory court and its authority to grant writs must be found in the statute if it exists. Section 12 of the act creating the Circuit Court of Appeals (26 Stat. 826, 828) provides that it shall have the powers specified in paragraph 716 of the Revised Statutes of the United States; and as was said in *McClellan* v. *Carland (supra)*,

> "that section when read in connection with paragraph 12 of the Court of Appeals act it gives the Circuit Court of Appeals the authority as this Court has to issue writs not specially provided for by statute and *necessary for the exercise of the Court's jurisdiction* and agreeable to the usages and principles of law."

The issuance of a writ of mandamus by the Circuit Court of Appeals in this case was not necessary for the exercise of that court's jurisdiction, which is only appellate. As was pointed out by Davis, Circuit Judge, in disallowing the writ of mandamus.

> "If we dismiss the rule the case may possibly reach this Court again, but if the judgment is reinstated the case will remain final in that court and will never come into this Court. The reinstatement of the judgment therefore cannot be in aid of the jurisdiction of this Court." (see p. 48 of transcript.)

Petitioner in his brief misconstrues entirely the opinion of the Circuit Court of Appeals in this case. He says on p. 21 of his brief:

> "In the case at bar the Circuit Court of Appeals held in effect that it had no jurisdiction because the action was pending in the District Court and had not been brought into its jurisdiction by a writ of

error and therefore the writ could not be issued as in aid of its jurisdiction."

He then quotes from the case of *Barber Asphalt Paving Company* v. *Morris*, the following:

"The moment such a suit is commenced the appellate jurisdiction over it exists, the power and the right to *ultimately* review the proceedings in it are vested in one of the Appellate Courts."

We have no complaint with that rule and we maintain that the Circuit Court of Appeals in the case at bar had it in mind when it rendered the decision disallowing the writ of mandamus; for the opinion reads,

"If we dismiss the rule the case *may possibly reach this Court again*, but if the judgment is reinstated the case will remain final in that Court and and will never come into this Court" (page 48, Case).

So that the Circuit Court of Appeals recognized the possibility of the case reaching the Circuit Court of Appeals again even though it was not in that court then, and thus the decision was in conformity with the rule.

The Circuit Court of Appeals can only review final decisions.

We further urge that the order made by the U. S. Dist. Court allowing a new trial was not a *final* decision, and therefore, the Circuit Court of Appeals had no jurisdiction to review it. In the United States Compiled Statutes (1925) is the following provision concerning appeals to the Circuit Court of Appeals 1120 (Judicial Code p. 128 amended) Appellate Jurisdiction (a) Review of final decisions—The Circuit Court of Appeals shall have Appellate jurisdiction to, review by appeal or writ of error final decisions—

First. In the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 238.

We have nothing to do with Section 238 which, however, I may state does not provide for a direct review in the U. S. Supreme Court of an order of the U. S. District Court such as was made in this case. We are only here concerned with the general provision; and that speaks of *final decisions* that may be reviewed by the Circuit Court of Appeals. The order of the U. S. District Court in this case allowing a new trial was not a final decision.

The case of *Ft. Dodge Portland Cement Corporation* v. *Monk*, 276 Federal Reporter, p. 113, presented the following facts. Action was to recover in the District Court of United States for District of South Dakota, the amount of a promissory note. Plaintiff in error recovered judgment for the amount of the note and interest. Defendant in error moved for a new trial. The trial court granted the motion for a new trial. The order granting a new trial did not in terms vacate the judgment for plaintiff in error, but that was its legal effect. Plaintiff in error sued out a writ of error from the order granting a new trial. Circuit Judge Carland in deciding the matter said:

> "Counsel for defendants in error insist that we have no authority to review the order granting a new trial for the reason that whether it should be granted or not rested in the sound discretion of the trial court and such discretion is not reviewable. It appears from the record, however, that we have no jurisdiction over the case and can do nothing but dismiss the writ of error. *Our jurisdiction to review the decisions of the District Court is limited by law to final decisions.* Judicial Code par. 128; section 6, Act of March 3, 1891, C. 517, 26 Stat. 828 (Comp. St. para. 1120)."

(See present law in U. S. Compiled Statutes (1925) 1120 (Judicial Code p. 128 amended); the statute is substantially the same insofar as it applies to the question here discussed.)

The opnion then continues:

> "So far as the finality of the order granting a new trial is concerned it left the case as if it had never been tried. It would, therefore, seem that no argument is necessary to show that an order which had the effect stated is not a final decision of the District Court. If, however, authority is required for the position here taken it may be found in Hume *v.* Bowie, 148 U. S. 245; Baker, *et al.* Assignees *v.* White, 92 U. S. 176; Parcels *v.* Johnson, 87 U. S. (20 Wall.) 653; McComb Ex. *v.* Com'rs Knox Co., 91 U. S. 1; Moore *v.* Robbins, 85 U. S. 588; St. Clair Co. *v.* Lovingston, 87 U. S. 628; Tracy *v.* Holcombe, 65 U. S. 426 (and other cases cited in the opinion. All the above are not cases where new trials have been granted but they are cases which clearly decide that the judgment appealed from must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance by the appellate court the court below would have nothing to do but to execute the judgment or decree which it had already rendered. Writ of error dismissed."

See also 11 Cyc. p. 941; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. p. 675; *Bostwick* v. *Brinkerhoff*, 106 U. S. p. 73; *Gibbons* v. *Ogden*, 6 Wheaton, p. 448. See foot notes. *Mayberry* v. *Thompson*, 5 Howard 121.

It is therefore submitted that:

First. The application for the writ of mandamus in the Circuit Court of Appeals was an attempt to use that writ as and for a writ of error or an appeal.

Second. The order of the U. S. District Court allowing a new trial was not a final decision and could not be reviewed by the Circuit Court of Appeals.

POINT II.

Mandamus should not issue unless there has been a definite unqualified refusal to act by the Inferior Court after previous request made to it.

In the case *sub jud.* the order of the United States District Court setting aside the verdict and granting a new trial was entered May 11, 1925 (see p. 12 transcript). That was the last act of the United States District Court in the cause. No further step was taken by the railroad company (the petitioner herein), before the United States District Court to vacate the order granting a new trial; hence there was no refusal by that court.

Mesler v. *Jackson*, Circuit Judge, 154 Northwestern Reporter, p. 63, recognizes the general rule that 'A writ of mandamus to compel the judge of a lower court to vacate his order may be denied where there has been no application to him to set aside the order." See also *Hitchcock* v. *Wayne*, Circuit Judge, 97 Mich. 614, 56 N. W. Rep. 189. *Freud* v. *Wayne*, Circuit Judge, 131 Mich.; N. W. Rep. 109; *Bennett* v. *Kalamazoo*, Circuit Judge, 181 Mich. 709; 148 N. W. Rep. 162.

Edinburg Coal Co. v. *Humphreys*, Judge, 134 Federal Reporter, p. 839, also recognizes and applies this rule, the Court saying: "Were the proceedings in the District Court *coram non judice* the relator's petition would fail because of want of application to the District Court before the presentation of the petition here."

The prayer of petitioner's petition in the Circuit Court of Appeals in the case *sub jud.* (see page 6 transcript of record) asks that "A writ of mandamus may issue out of this Honorable Court (Circuit Court of Appeals) directing and commanding the said Honorable John Rellstab, Judge of the said District Court, and said District Court to reinstate the judgment entered in said District Court in favor of your petitioner (railroad company) etc."

Short on Mandamus (text book series) on page 267 states the rule as follows:

> "The Court, before it will grant a mandamus, must be convinced that there has been a demand made by a party having a right to make it for the performance of the duty sought to be enforced and a refusal to perform it by the party against whom the application is made."

No application to the United States District Court to reinstate the judgment was made by the railroad company in this case.

The writ of mandamus could only be used to compel the United States District Court to perform the duty (if the duty existed) of reinstating the judgment after it had refused to perform that duty, but it could not be used by the Circuit Court of Appeals to undo the order of the United States District Court allowing a new trial to the plaintiff.

Short on Mandamus (supra), p. 247, states the rules as follows:

> "The application must be to compel the performance of some duty which has not been done *it must not be to order the undoing of an act which has been done.*"

See also *Corpus Juris*, Vol. 38, p. 592.

It cannot be said that it would have been unavailing for petitioner to have made the application to the United States District Court for an order to vacate the order allowing a new trial; for District Court Judge Rellstab in allowing the new trial said:

> "However if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire."

Counsel however did not choose to brief the matter and did not apply to the U. S. District Court to set aside the order allowing a new trial.

POINT III.

The granting or refusing of a writ of mandamus is discretionary.

There may be circumstances in which the writ will not operate fairly *or will not permit substantial justice*, and in which the Court may deny the writ though the petitioner may have a clear legal right.

In the case at bar a grave injustice would be perpetrated should this Court reinstate the judgment set aside by Judge Rellstab. It was a judgment tainted with fraud and perjury and Judge Rellstab after hearing the evidence so found, and it must shock the conscience of this Court to be obliged to listen to an application asking its aid in the perpetuation of a fraud and the promotion of manifest injustice; since the granting or refusing of the writ is discretionary this court ought not to hesitate a moment to announce that it will not compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a fraud.

The principle contended for finds support in the cases and has been frequently applied by this Court.

Duncan Townsite Co. v. *Lane, Secretary of Interior*, 245 U. S. 308, 38 Sup. Ct. 99, was an application by petition, for a writ of mandamus brought in the Supreme Court of the District of Columbia, to compel the Secretary of the Interior to restore the name of Nicholas Albertson, deceased, to the rolls under the Choctow-Chickasaw agreement of July 1, 1902, and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission. Under that act only the names of persons alive September 25, 1902, were entitled to entry on the rolls; Albertson had died before that date. The entry of his name and the issuance of the certificate were procured by fraud and perjury and the Sec. of the Interior upon recommendation of the commission removed

Albertson's name from the rolls, held the certificates for cancellation and allotted the land to others. Notice of the hearing before the Commission was given to Albertson's Administrator and attorney of record, but not to the relator who had under the Oklahoma law recorded the deed assigning the certificate and was in actual possession of the premises. The relator purchased the certificates before July 11, 1908, for value in good faith without knowledge of the fraud or notice of the proceedings for cancellation hereinbefore referred to. The Supeme Court entered judgment for the relator commanding issue and record of the patent but making no order in respect to restoring Albertson's name to the rolls. The relator acquiesced in the judgment but on a writ of error sued out by respondent the judgment was reversed by the Court of Appeals and the relator brings the case here on writ of error.

Mr. Justice Brandies in disposing of the application for a mandamus said:

> "*Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion.* It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles. The relator having itself only an equity seeks the aid of the Court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose.
>
> See Turner v. Fisher, 222 U. S. 204, 32 Sup. Ct. 37, 56 L. Ed. 165. Judgment of the Court of Appeals is affirmed."

And in the case of *U. S.* v. *Cargill*, 258 Fed. Rep., which cites with approval *Duncan Townsite Co.* v. *Lane, supra,* the Court says on page 467:

> "Mandamus is a writ of discretion."

And in the case of *U. S.* v. *Burleson*, 258 Fed. Rep. p. 282, the Court says:

> "Mandamus a remedial process is awarded not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles."

That case cites with approval *Duncan Townsite Co.* v. *Lane, supra; Arant* v. *Lane*, 249 U. S. p. 367; In *U. S. ex rel. Arant* v. *Lane, Secretary of Interior, supra,* the relator on April 30, 1915, filed his petition in the Supreme Court of the District of Columbia, for a writ of mandamus against Franklin K. Lane, as secretary. He alleged that when serving as a duly apointed Superintendent of Crater Lake National Park, June 7, 1913, defendant requested him to resign; that protesting against such removal from office he demanded that he be furnished with a statement in writing of the reasons for his removal and that he be given a reasonable time in which to answer and upon July 20, 1913, he was forcibly ejected from the Government office building and the records and papers of his office were seized by Government officials. He further averred: that as such superintendent he was in the classified civil service of the Government and that he could not lawfully be removed therefrom except for such cause as would promote the efficiency of the service and for reasons stated in writing which he must be given a reasonable opportunity to answer. His prayer was that the defendant be required to answer his petition and that upon hearing, a writ of mandamus should issue requiring the defendant to vacate the order for his dismissal and to restore him to his former office.

In response to a rule to show cause the defendant filed an answer to which a demurrer was interposed; the de-

murrer was overruled and the relator electing to stand on his demurrer his petition was dismissed.

It will be seen that although the relator was definitely removed from office as of June 30, 1913, and was forcibly ejected from the Government office building on July 20, 1913, he did not file his petition until more than twenty months later, April 30, 1915.

Without discussion of the authority of the Secretary of the Interior to remove the relator without filing charges against him and giving him an opportunity to answer, the Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia, on the ground of laches and the case is here on a writ of error.

The Court in an opinion by Mr. Justice Clark, said:

> "In this conclusion we fully concur.
>
> This Court has lately said that while mandamus is classed as a legal remedy it is a remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles.
>
> Duncan Townsite Co. v. Lane, *supra.*
>
> It is an extraordinary remedy and it is generally recorded as not embraced within statutes of limitation applicable to ordinary actions, but is subject to the equitable doctrine of laches."

Another case in point is *People, ex rel. Wood* v. *Board of Assessors and Collector of Taxes of Brooklyn*, 137 N. Y., page 203, in which the Court said as follows:

> "But there is still a further ground upon which the decision below can be upheld even if we assume there was a technical want of adequate authority to make the alteration and correction complained of. The writ of mandamus is not always demandable as an absolute right, and whether it shall be granted or not frequently rests in the discretion of the Court. The State *ex rel.* v. Commissioners of Phillips Co., 26 Kan. 419; People v. Hatch, 33 Ill. 9,

134; People, *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y. 360.

The writ will be granted to prevent a failure of justice, but never to promote manifest injustice. It is a remedial process and may be used to remedy a wrong not to promote one; to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief *or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud.*

The relator must come into court with clean hands and he cannot invoke this extraordinary remedy as in this case to evade the payment of a just portion of a tax by taking and claiming the advantage of a confessed mistake. Even if he had no other remedy he should be left to his own devices to escape the burden honestly resting upon him, and the Court may properly refuse to aid him by compulsory process."

In 26 *Cyc.*, p. 155, appears the following:

"The writ is employed to promote principles of justice." Hence the writ will not issue in support of unjust claims although they may be technically regular."

And on pp. 150-151 same volume of *Cyc.* the following appears:

"The relator's hands must be clean; he must not have contributed to the condition complained of." "It will never issue to accomplish a wrong."

In the case at bar the right sought to be enforced is the re-possession of a judgment which is admittedly tainted with fraud and perjury. Petitioner does not deny the fraud or perjury, it is a conceded fact in the case, and since the writ of mandamus is not demandable as an absolute right but calls for the exercise of discretion it should not be allowed to promote a manifest injustice, and the application was properly denied by the Circuit Court of Appeals.

Under the present heading it may be proper to notice another point which petitioner offers for the consideration of this Court.

Beginning on p. 25 of petitioner's brief it is contended by petitioner that the Circuit Court of Appeals had jurisdiction to issue the writ in vindication of its own mandate affirming the judgment in question, on a previous appeal.

It may be that the Circuit Court of Appeals had jurisdiction to issue the writ, if it saw fit; but it was not bound to do so. It was discretionary with the Circuit Court of Appeals to require the petitioner to have the order of the U. S. District Court reviewed by a writ of error or an appeal rather than a writ of mandamus; and this view has found support in a very recent decision of the Circuit Court of Appeals.

I refer to the case of *Brictson Mfg. Co.* v. *Munger, District Judge, et al.*, decided by the Circuit Court of Appeals, 8th Circuit, on June 13th last, in which that Court held likewise that the allowance of the writ of mandamus a matter of discretion. That was a case similar to the case at bar. It was a motion for leave to file a petition for a writ of mandamus and for an order to show cause against Hon. T. C. Munger, District Judge for the District of Nebraska.

The matters involved occurred in the receivership proceedings of the *Brictson Mfg. Co.* v. *Close*, other phases of the litigation appear in this Court in *Brictson Mfg. Co.* v. *Close* and in other suits. The Close opinion determined that a receiver for the Brictson Mfg. Co. had been wrongfully appointed and that the receiver should be required to return all property in his hands to those from whom he had received it, that he be thereupon discharged and that the bill be dismissed at complainant's costs. Had such directions of this Court (Circuit Court of Appeals) been carried out, much, if not all of the subsequent com-

plications and harassments might have been avoided, but they were not.

In 1921, 1924, lands of the Company (then in possession of the receiver) were sold for State taxes and a tax deed issued in May, 1926. The holder of the tax deed executed a quit-claim deed to Mary J. Rosso, who made repairs and improvements on the property. The Company filed a petition to have these deeds declared void, etc. This petition is based on the theory that the above decrees are in violation of the mandates of this Court sent down on prior proceedings in this Court. The basis of jurisdiction in this Court to maintain the mandamus is stated to be to protect the orders and mandates of this Court.

In an opinion by Circuit Judge Stone, the Court says:

> "We have no doubt of the jurisdiction of this Court (Circuit Court of Appeals) to compel the enforcement of its decrees and mandates by mandamus." Citing Louisville, 23 U. S. 639, 34 Sup. Ct. 255, 58 L. Ed. 413; *In re* Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 Sup. Ct. 291, 40 L. Ed. 414.
>
> We do not question our power to issue the writ in the present proceedings. However, mandamus is not a writ of right, but it is issued as a matter of sound judicial discretion. Citing Duncan Townsite *v.* Lane, *supra;* Turner *v.* Fisher, 222 U. S. 204. • • • Nor is the right remedy to be employed as a substitute for the ordinary modes of review (appeal and writ of error)."
>
> "Where a trial court has filed a mandate may be examined on appeal.
>
> Citing Steinfeld *v.* Zeckendorf, 239 U. S. 26, and in denying the writ the court says:
>
> 'We think a sound judicial discretion required a denial of the application to file the petition and for that reason it is denied.'"

In the above case it thus appears that the Court exercised its discretion in denying the application for a mandamus where it had the power and jurisdiction to allow the writ, and required the petitioner to resort to an appeal or writ of error to have reviewed an order said to be in conflict with the mandate of that Court.

We respectfully urge that in the case at bar the Circuit Court of Appeals was not bound to allow a writ of mandamus to review an order of the lower court said to be in conflict with its mandate. It was discretionary with the Circuit Court of Appeals to allow or withhold the writ, and we submit that this Court ought not to substitute its discretion for that of the Circuit Court of Appeals.

And, lastly, we urge that the basis of petitioner's application in the Circuit Court of Appeals was not the protection of the mandate of that Court, but the granting of a new trial after the term at which it was rendered had expired.

We beg leave to refer to the petition filed by petitioner in the Circuit Court of Appeals, on page 5 of the transcript. Par. XIV reads as follows:

> "XIV. Your petitioner further shows that it is advised that the said Honorable John Rellstab, Judge of the said District Court, and said District Court had no right or authority to disturb or set aside the verdict and judgment entered thereon in favor of the defendant on June 21, 1923, *because the said District Court had lost jurisdiction of said cause, the term of said District Court in which said judgment final was rendered in favor of your petitioner having long since expired and having not been extended either by stipulation between the parties thereto or any order of the Court in the premises.*"

The word "mandate" appeared twice in the petition, once in Par. VI and once in Par. VII, but only by way of recital. Nowhere in the petition did the petitioner urge

the violation of the Court's mandate as a ground for allowing the writ of mandamus; and while petitioner's brief in the Circuit Court of Appeals is no part of the record in this Court, yet it may be interesting to know that that brief made no mention of the mandate of the Circuit Court of Appeals, but rested the case upon the one ground set forth in Par. XIV of the petition above set forth.

We fail to understand, therefore, how petitioner can complain in this Court of the alleged failure of the Circuit Court of Appeals to protect its own mandate in favor of the petitioner, and ask this Court to reverse the ruling of the Circuit Court of Appeals when that Court was never asked to pass upon that question.

For the foregoing reasons we respectfully submit that the application of petitioner be denied.

Respectfully submitted,

HARRY KALISCH,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 141.—October Term, 1927.

The Delaware, Lackawanna and Western Railroad Company, Petitioner, vs. John Rellstab, Judge of the United States District Court for the District of New Jersey, and the United States District Court for the District of New Jersey.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 16, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

In this case one Ginsberg, in December, 1921, recovered judgment in the District Court against the petitioner for injuries to himself and a minor son and for the death of another son, caused by a collision, at a crossing, between the plaintiff's truck and one of the petitioner's trains. The judgment afterwards was set aside on the evidence of two important witnesses, husband and wife, that they had committed perjury at the trial. A new trial was had which resulted in a judgment for the defendant, the present petitioner. The judgment was entered on June 21, 1923. It was taken to the Circuit Court of Appeals on writ of error and on March 21, 1924, a mandate from that court affirmed the judgment with costs. See 296 Fed. Rep. 439. The witnesses who had testified for the plaintiff at the first trial testified for the defendant at the second, and after the term of the District Court in which the foregoing steps had been taken had expired without being extended in any form, the husband made an affidavit showing that his testimony at both trials was false and that in fact he knew nothing about the matter. The trial Judge was applied to, and after hearing testimony in open court he made an order on May 9, 1925, purporting to set aside the judgment that had been affirmed by the Circuit Court of Appeals during a previous unextended term. The peti-

tioners thereupon applied to the Circuit Court of Appeals for a writ of mandamus to reinstate the judgment, but the Circuit Court of Appeals held that it had no jurisdiction to grant the writ. 15 F. (2d) 137. A writ of certiorari was granted by this Court. 273 U. S. 685.

However strong may have been the convictions of the District Judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. The power of the Court to set aside its judgment on this ground ended with the term. *In re Metropolitan Trust Co.*, 218 U. S. 312, 320. As the Court was without jurisdiction to vacate the judgment mandamus is the appropriate remedy unless to grant that writ is beyond the power of the Circuit Court of Appeals. *In re Metropolitan Trust Co.*, 218 U. S. 312, 321. We perceive no reason to doubt the power of that Court. It had affirmed the judgment of the Court below. *Brown* v. *Alton Water Co.*, 222 U. S. 325, 332. Like other appellate courts (*In re Potts*, 166 U. S. 263,) the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower Court, exceeding its jurisdiction, may interpose. *McClellan* v. *Carland*, 217 U. S. 268. The issue of a mandamus is closely enough connected with the appellate power.

But it is said that the granting of the writ of mandamus is discretionary and it is implied that if we are of opinion that the Circuit Court of Appeals was mistaken in denying its power to grant the writ, that court still might deny it on the ground that injustice would be done if the judgment were allowed to stand. But neither Court would be warranted in declaring the judgment unjust after it had become unassailable—certainly not on a speculation as to which of three statements is true, when it was known at the trial that the witness was perjured, either at the first trial, as he said, or then—not to speak of the further difficulties that the plaintiff might encounter in the recent decision of *Baltimore & Ohio R. R. Co.* v. *Goodman*, October 31, 1927. It certainly would be unjust to leave the case in the air, because the District Court had made an unwarranted attempt to set aside a judgment that it had no jurisdiction to touch.

It follows that the writ should issue.

Judgment reversed.